However, there is no law that supports Appellants' conclusion that the constitutionally-required minimum number of redistricting plans in a decade – one – is also the maximum allowable. As the Ninth Circuit concluded in *Garza v. County of Los Angeles*, 918 F.2d 763, 772 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991): "*Reynolds* did not institute a constitutional maximum frequency for reapportionment; rather, it set a floor below which such frequency may not constitutionally fall."

Without limitation, Art. I, § 4 of the United States Constitution vests in the state legislatures the power to draw their Congressional districts; there is no limit on the number of times a state legislature may redistrict. Likewise, although Congress has reserved to itself the power to regulate the time, place and manner of Congressional elections, 2 U.S.C. §§ 2a & 2c (2005), it has not restricted the number of times a state legislature may redistrict.

In short, a reading of the plain language of both federal constitutional and statutory provisions demonstrates that there is no limit on the number of redistricting plans that a state may implement during a decade. Likewise, a review of federal caselaw demonstrates that that redistricting plans may be amended throughout the decade. *Reynolds,* at 583-84; *Daly v. Hunt*, 93 F.3d 1212, 1228 n.15 (4th Cir. 1996); *Garza*, 918 F.2d at 772; *Johnson v. Mortham*, 926 F. Supp. 1460, 1494 (N.D.Fla. 1996) ("*Johnson II*") (three-judge panel), *aff'd sub nom., Johnson v. Smith*, 132 F.3d 1460 (11th Cir. 1997).

While some states impose restrictions upon the frequency of redistricting, the majority have not chosen to do so. In Georgia, for example, the General Assembly is not constrained by constitutional or statutory law with

respect to the number of times redistricting plans may be amended in the course of a decade, and redistricting plans have routinely been amended throughout the decade.

## III. PROHIBITING REDISTRICTING MORE THAN ONCE A DECADE WILL PERMIT EGREGIOUS PARTISAN GERRYMANDERING IN THE ORIGINAL REDISTRICTING PLAN AND FORECLOSE ANY EFFORT TO REMEDY THAT PLAN FOR AN ENTIRE DECADE

Using Appellants' theory, the gross partisan gerrymander enacted by the Georgia General Assembly in 2001, *see* App. 1, would have been irrevocable. As the first plan enacted following the Census, Appellants would argue that the Georgia plan was immune from a partisan gerrymander attack because as it was enacted after the Census and ostensibly for the purpose of equalizing population, its "sole purpose" could not have been the maximization of partisan advantage.

In fact, even a cursory review of Georgia's 2001 Congressional redistricting plan demonstrates that the maximization of partisan advantage was the sole purpose of the plan; the fact that the Census had been released and the districts' populations needed to be equalized was a happy coincidence. Looking at the 2001 plan first as a whole, App. 1, and then by individual district, App. 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, there can be no doubt that the districts were grossly gerrymandered for political purposes. Absent the General Assembly's ability to redistrict again, Georgia voters would have been locked into a Congressional redistricting plan in which "districts" bore no semblance to a reasonable definition of that word.

Contrary to Appellants' fears, the Georgia General Assembly's mid-decade redistricting did not result in a partisan gerrymander. Instead, the legislature employed traditional redistricting criteria which had been used in Georgia Congressional plans prior to the 2001 plan – keeping counties whole, achieving true contiguity (rather than point contiguity) and compactness,[2] honoring the traditional cores of districts – and complied with the requirements of one person, one vote

---

[2] A comparison of the compactness measurements between the 2001 and 2005 districts shows a marked improvement in the 2005 plan. The change in the results of perimeter test, which measures the total distance around a district by measuring the line distance, demonstrates how contorted the districts were in the 2001 plan. By eliminating the numerous subdivision splits and meandering jagged boundaries, the 2005 General Assembly substantially reduced the attenuated 2001 geographic boundaries by a factor of more than one-third (8695-5589=3106; 3106/8693=36%). Likewise, the scores improved under the Polsby-Popper test, which deems districts closer to 1 more compact and closer to 0 less compact.

| 2001 District Number | 2001 District Number | 2001 District Number | 2001 District Number | 2001 District Number | 2001 District Number |
|---|---|---|---|---|---|
| 001 | 001 | 1106.76 | 0.12 | 763.77 | 0.26 |
| 002 | 002 | 697.12 | 0.26 | 692.98 | 0.29 |
| 008 | 003 | 1054.98 | 0.04 | 495.02 | 0.21 |
| 004 | 004 | 112.97 | 0.25 | 135.93 | 0.23 |
| 005 | 005 | 188.24 | 0.09 | 108.48 | 0.26 |
| 006 | 006 | 211.99 | 0.12 | 173.88 | 0.29 |
| 007 | 007 | 480.31 | 0.07 | 227.78 | 0.24 |
| 003 | 008 | 949.72 | 0.15 | 713.98 | 0.18 |
| 010 | 009 | 487.17 | 0.2 | 371.31 | 0.4 |
| 009 | 010 | 872.07 | 0.12 | 614.32 | 0.2 |
| 011 | 011 | 1167.02 | 0.03 | 306.4 | 0.36 |
| 012 | 012 | 770.7 | 0.11 | 738.29 | 0.2 |
| 013 | 013 | 596.3 | 0.03 | 246.75 | 0.12 |
| Sum | Sum | 8695.35 | N/A | 5588.89 | N/A |
| Min | Min | N/A | 0.03 | N/A | 0.12 |
| Max | Max | N/A | 0.26 | N/A | 0.4 |
| Mean | Mean | N/A | 0.122308 | N/A | 0.249231 |
| Std. Dev. | Std. Dev. | N/A | 0.076284 | N/A | 0.074662 |

and Sections 2 and 5 of the Voting Rights Act, 42 U.S.C. § 1971 et seq. In doing so, the General Assembly succeeded in creating a Congressional plan comprised of actual districts rather than pieces of geography strung together for partisan purposes. App. 2, 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 26, 28.

In eliminating the contorted districts and returning cognizable districts to the voters, the Republican-controlled 2005 Georgia General Assembly did not simultaneously engage in the maximization of partisan advantage, as demonstrated by the following chart. Using the Bush vote in the 2000 election as its measurement, the chart shows a noticeable lack of an effort to grab partisan advantage:

| Member | District 2001 Plan | District 2005 Plan | % Bush 2001 Plan | % Bush 2005 Plan | Change in Bush%, 2001 to 2005 Plans |
|---|---|---|---|---|---|
| Kingston | 1 | 1 | 64.5-R | 62.4-R | -2.1 |
| Bishop | 2 | 2 | 51.0-R | 47.6-D | -3.4 |
| Westmoreland | 8 | 3 | 70.1-R | 67.0-R | -3.1 |
| McKinney | 4 | 4 | 29.3-D | 29.9-D | +0.6 |
| Lewis | 5 | 5 | 28.9-D | 27.2-D | -1.7 |
| Price | 6 | 6 | 69.2-R | 68.2-R | -1.0 |
| Linder | 7 | 7 | 72.0-R | 69.2-R | -2.8 |
| Marshall | 3 | 8 | 52.5-R | 58.1-R | +5.6 |
| Deal | 10 | 9 | 71.2-R | 71.0-R | -0.2 |
| Norwood | 9 | 10 | 67.8-R | 62.8-R | -5.0 |
| Gingrey | 11 | 11 | 52.2-R | 65.4-R | +13.2 |
| Barrow | 12 | 12 | 45.7-D | 47.8-D | +2.1 |
| Scott | 13 | 13 | 42.0-D | 43.3-D | +1.3 |

As a result of the new plan, there are only two districts in which the change in the 2000 Bush vote was greater than 5 percentage points. However, in the 2001 plan, both districts had previously been painfully contorted specifically to avoid a Republican district. *See* App. 17, 23. When the districts took on truly compact and contiguous shapes, the political performance numbers more accurately reflected the existing partisan strength. *See* App. 8, 24.

In summary, the ability to redistrict during the decade actually allowed the Georgia General Assembly to correct the gross partisan gerrymander that was the 2001 Georgia Congressional plan. Without such authority, the Georgia General Assembly would have had no ability to remediate Georgia's grossly gerrymandered 2001 Congressional districts and replace them with reasonable districts that provide fair representation to all Georgians. Mid-decade redistricting does not, as Appellants suggest, always result in partisan gerrymandering. Sometimes it cures it.

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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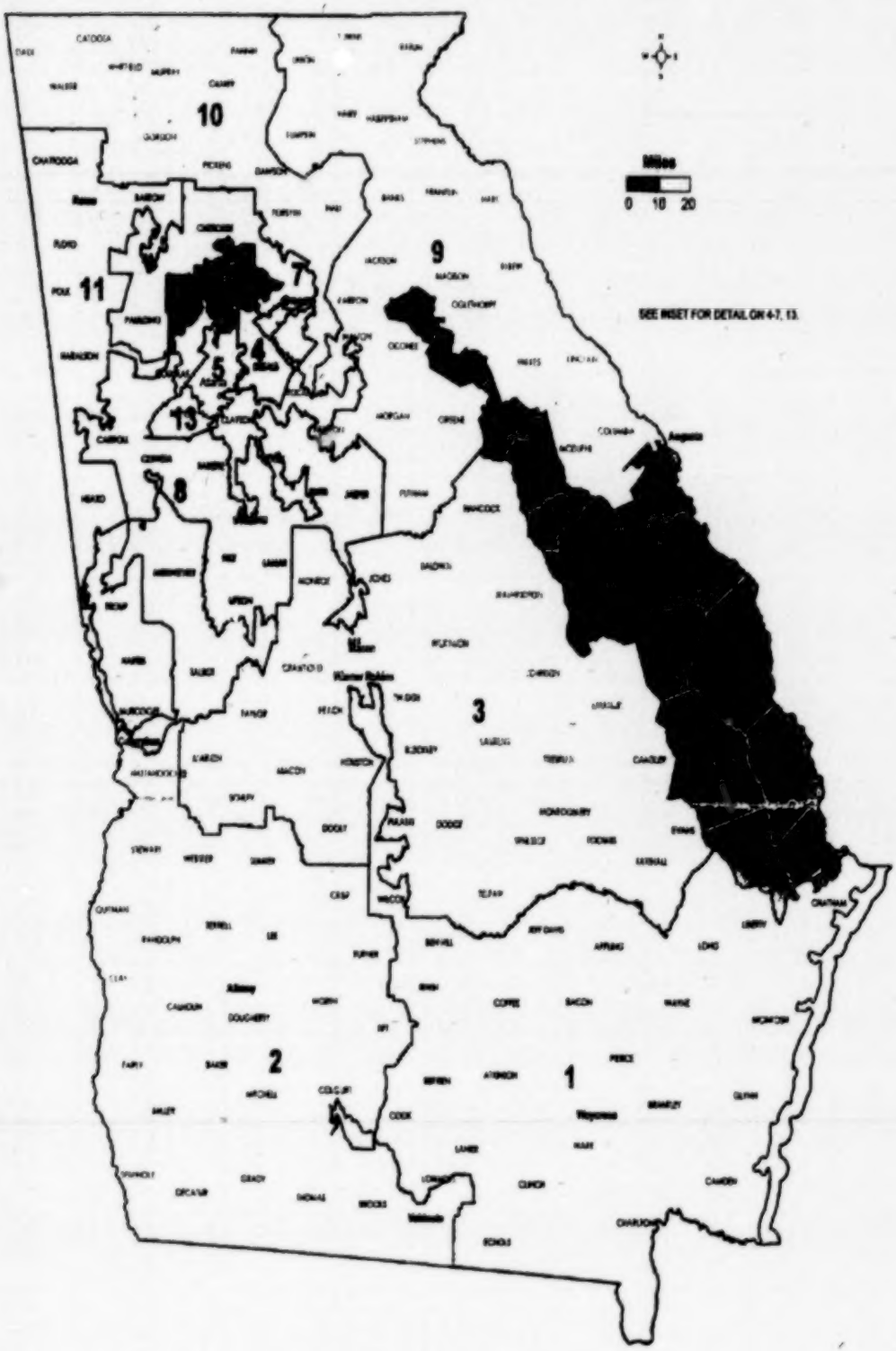
February 1, 2006

# Georgia

Congressional Districts for 2002-2004 elections.

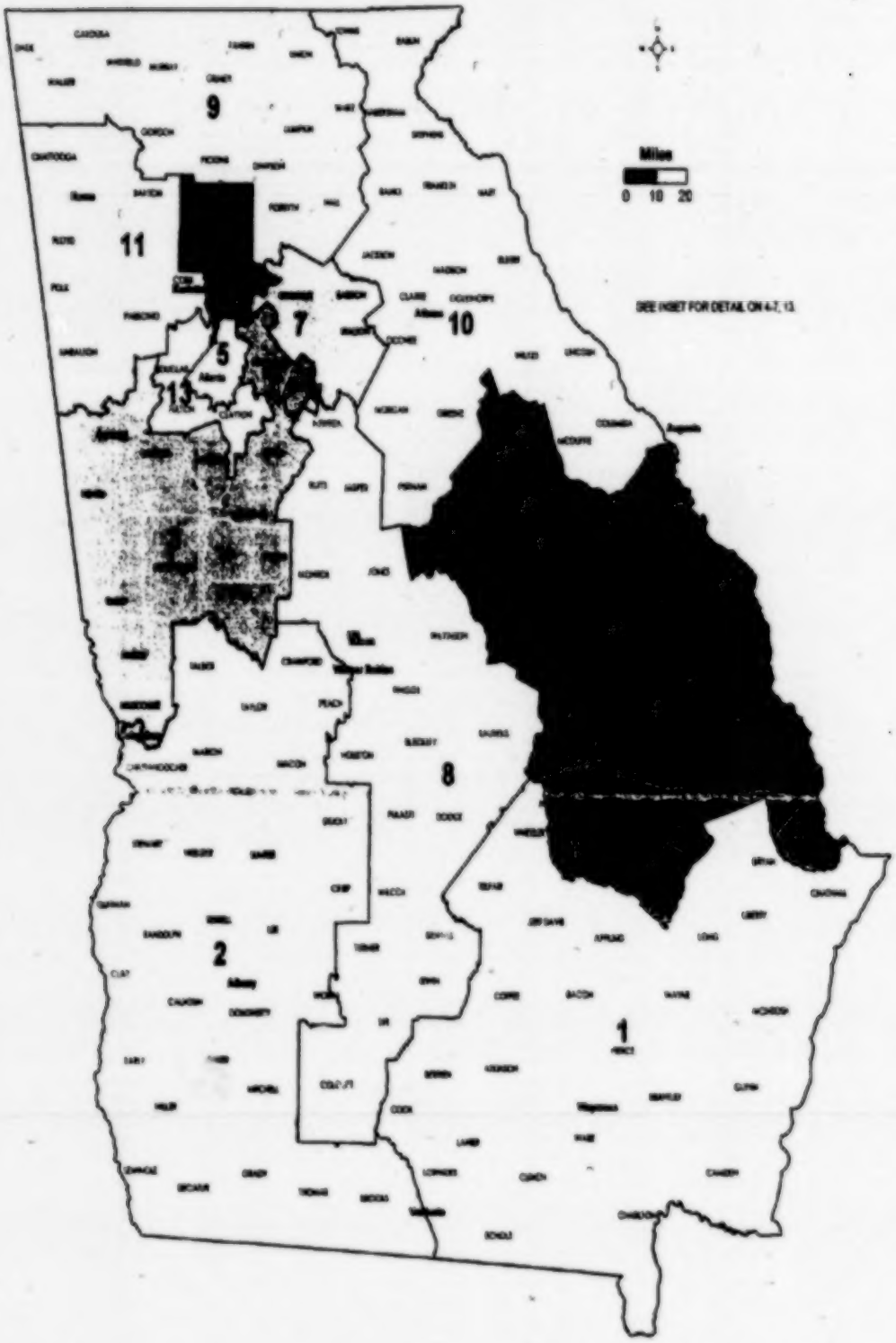



Congressional district boundaries first effective for the 2002 elections.

App. 1

# Georgia

Congressional Districts for 2006-2010 elections.




Congressional district boundaries first effective for the 2006 elections

App. 2

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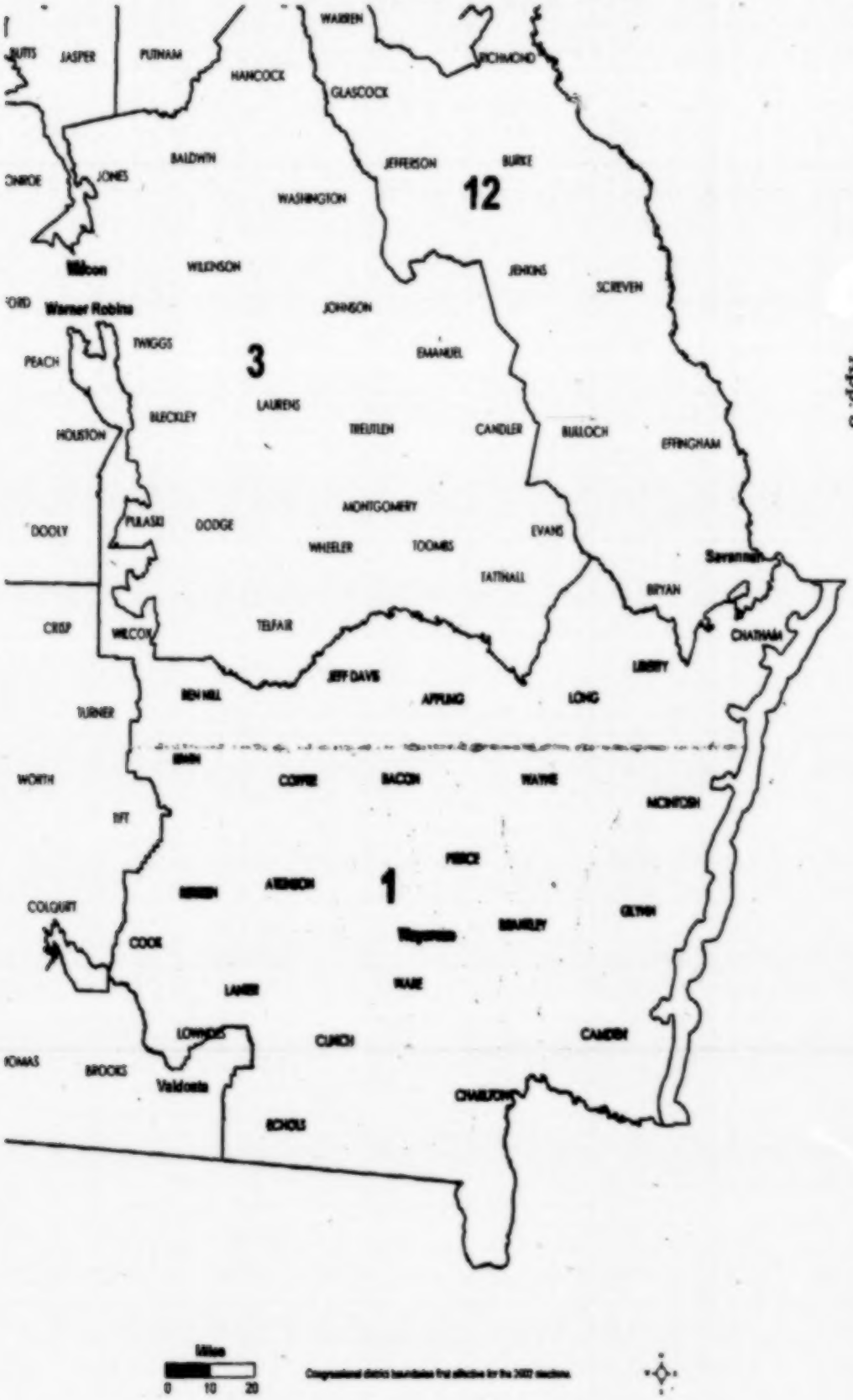
Congressional Districts for 2002-2004 elections.

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# Georgia

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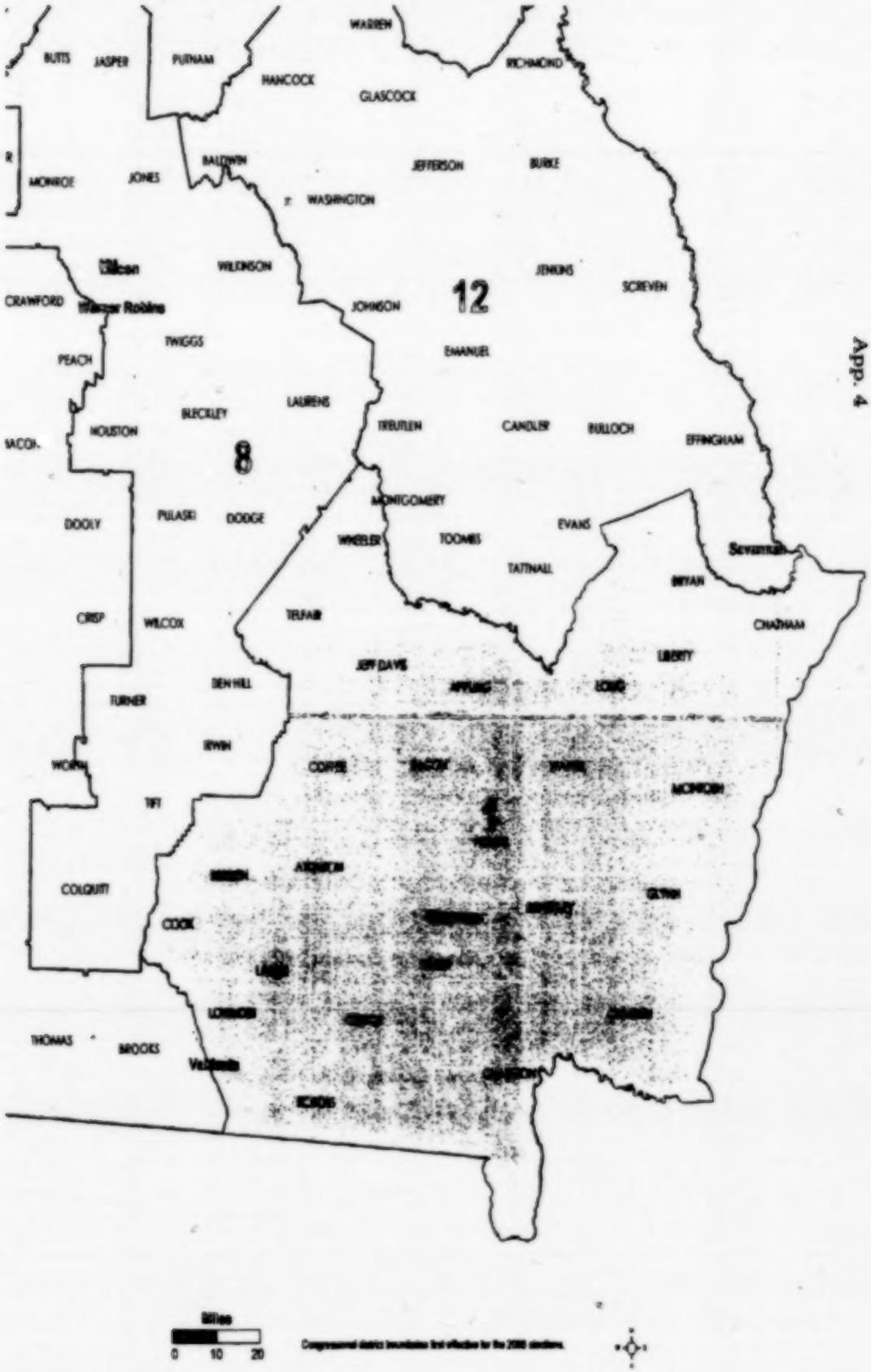


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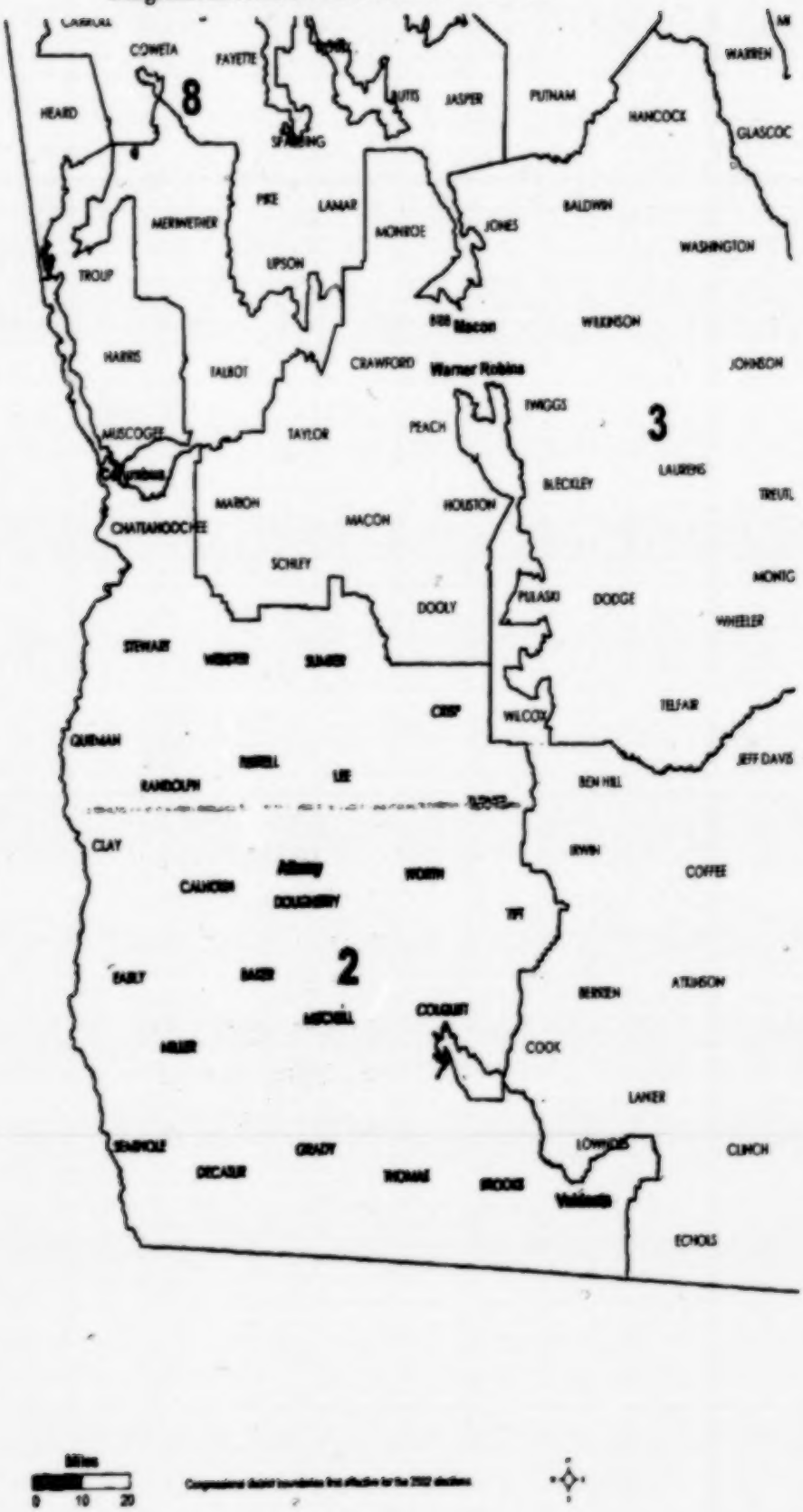


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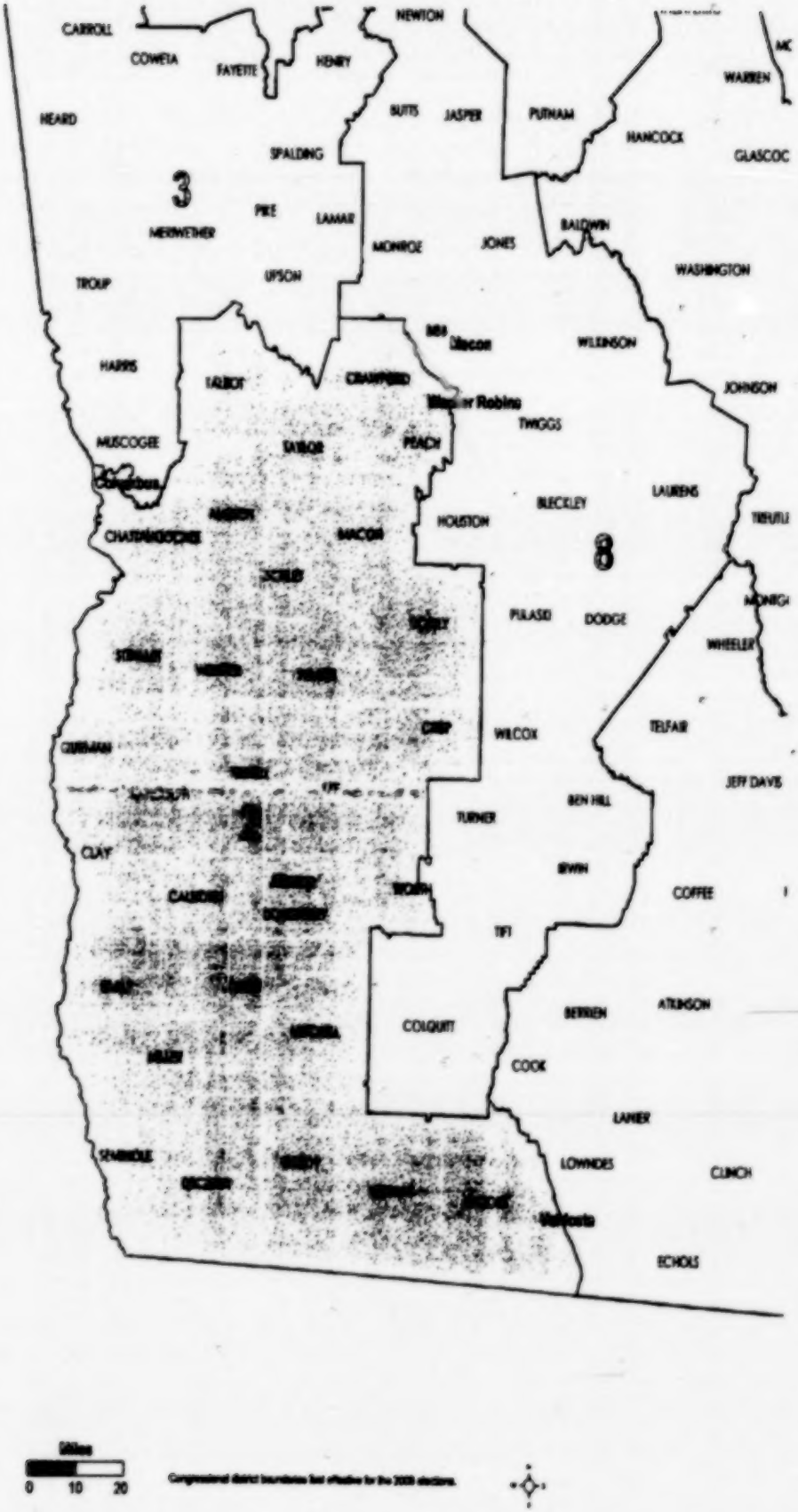

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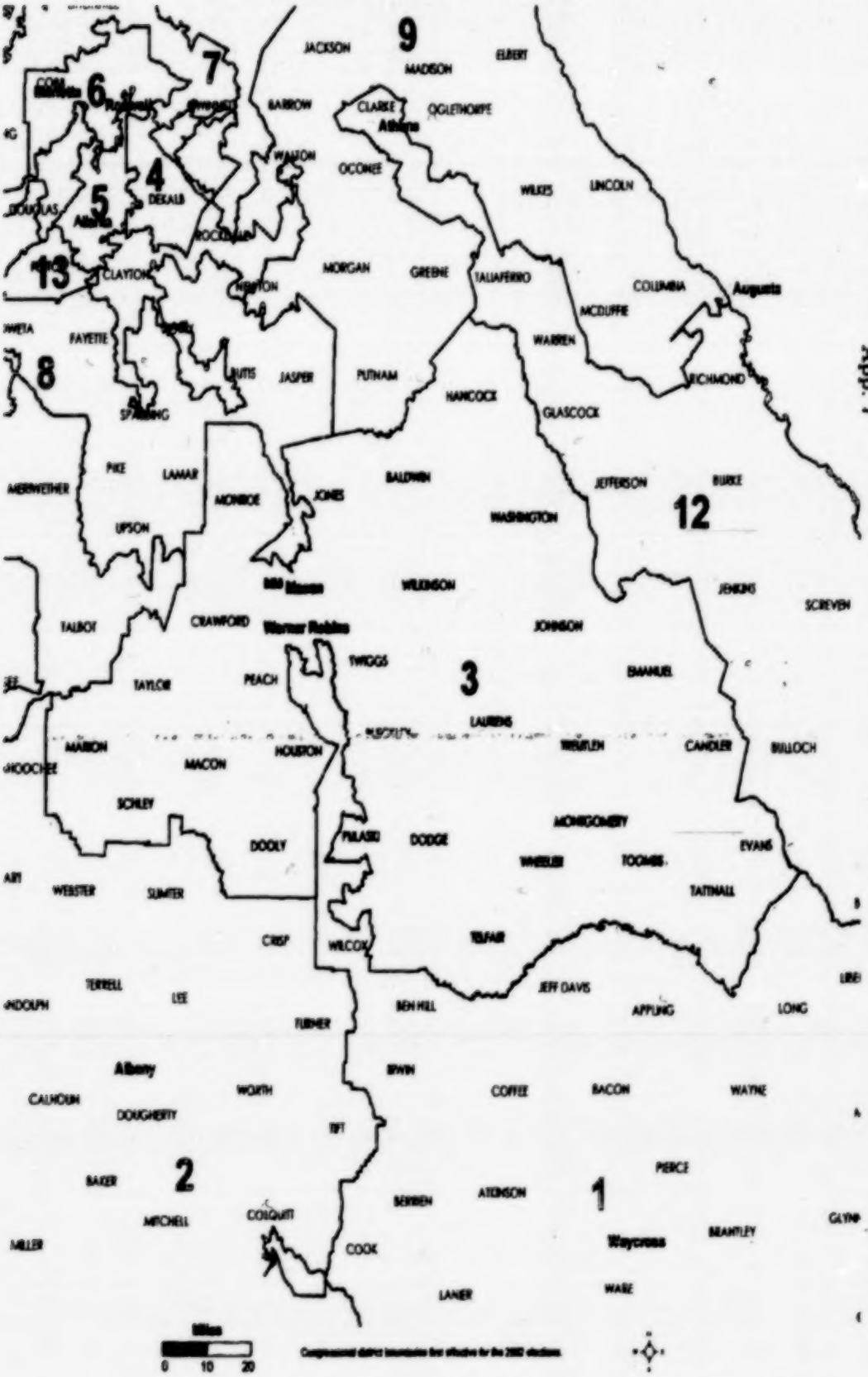
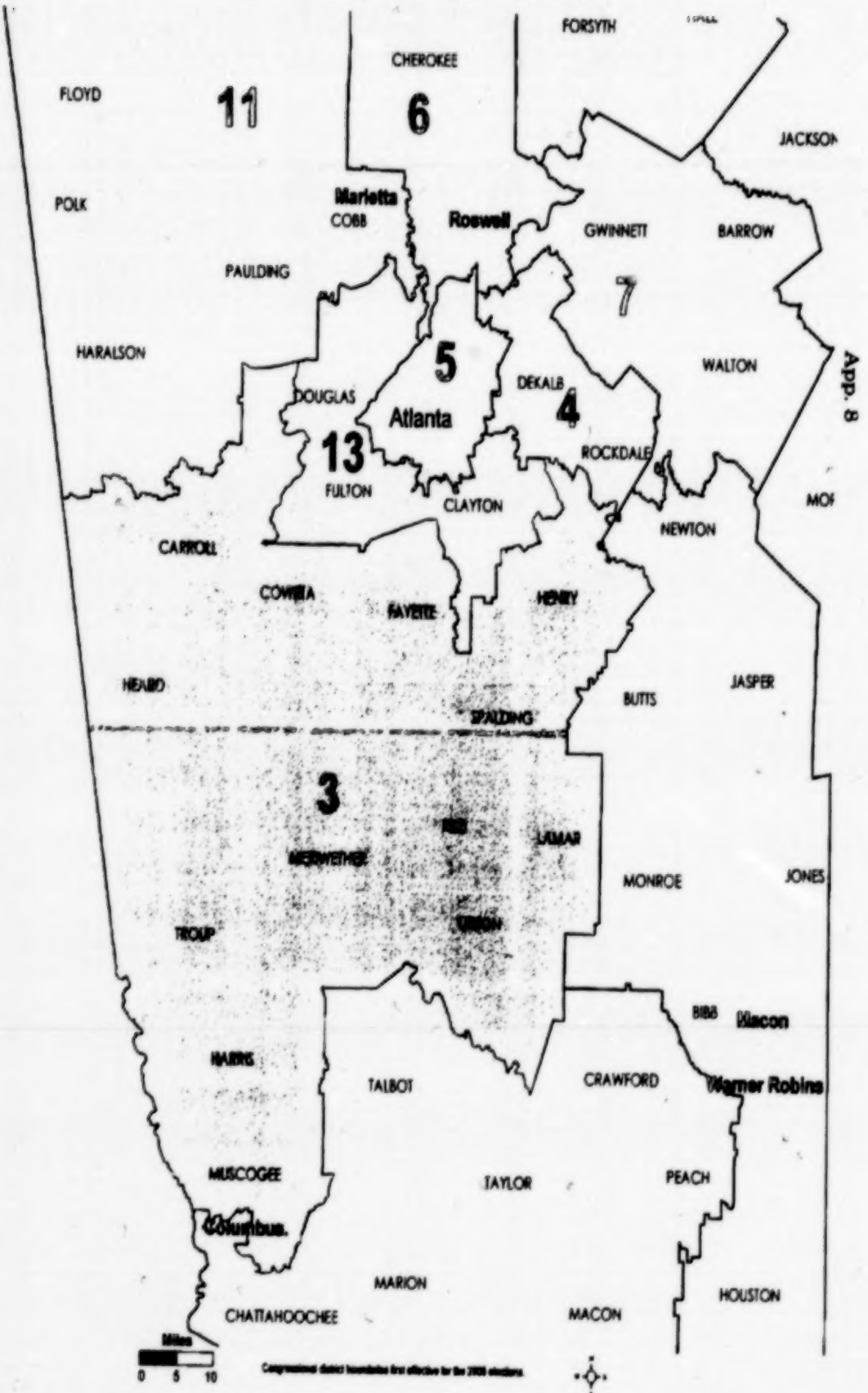



Congressional district boundaries first effective for the 2002 elections.

App. 7

# Georgia

Congressional Districts for 2006-2010 elections.



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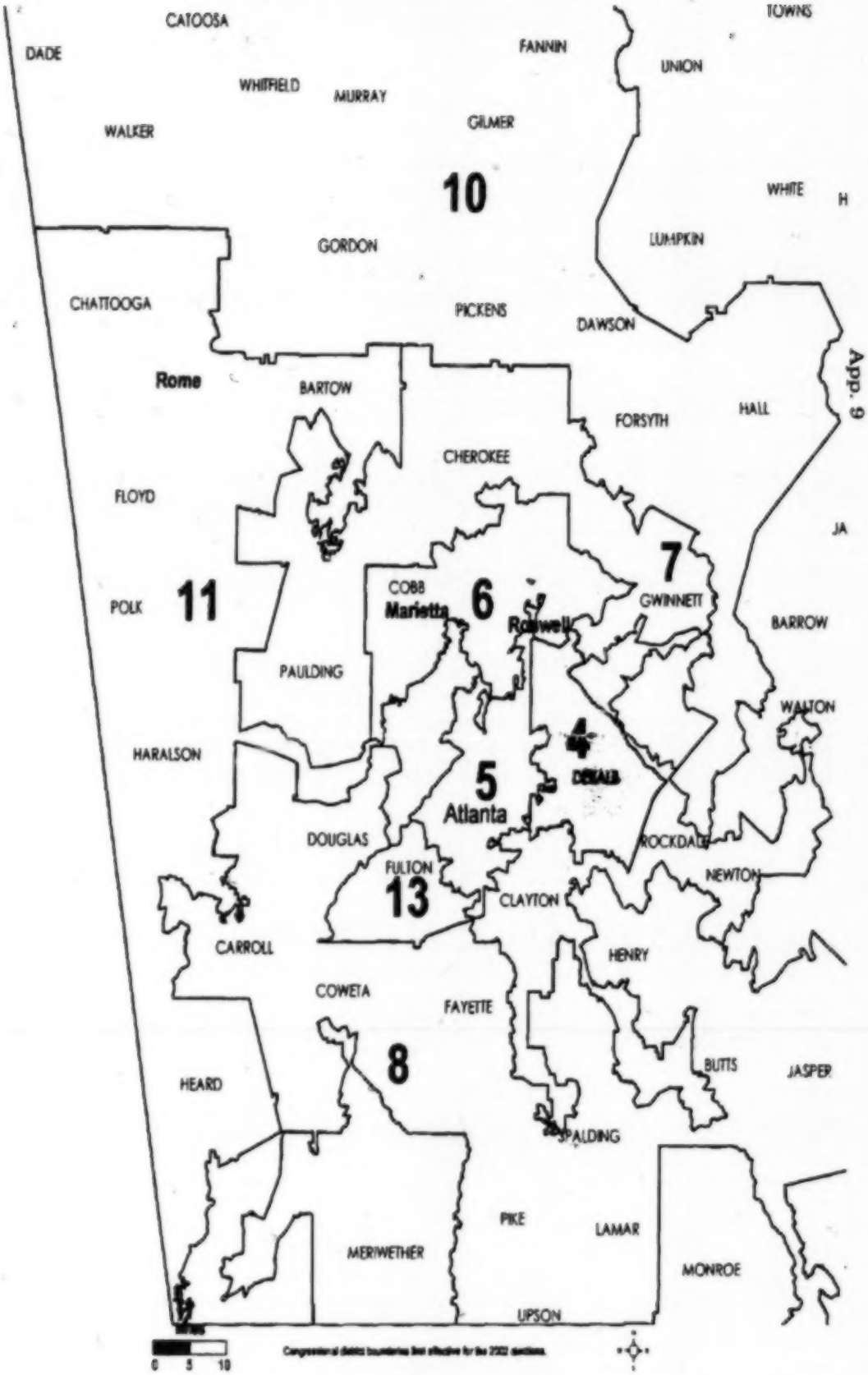

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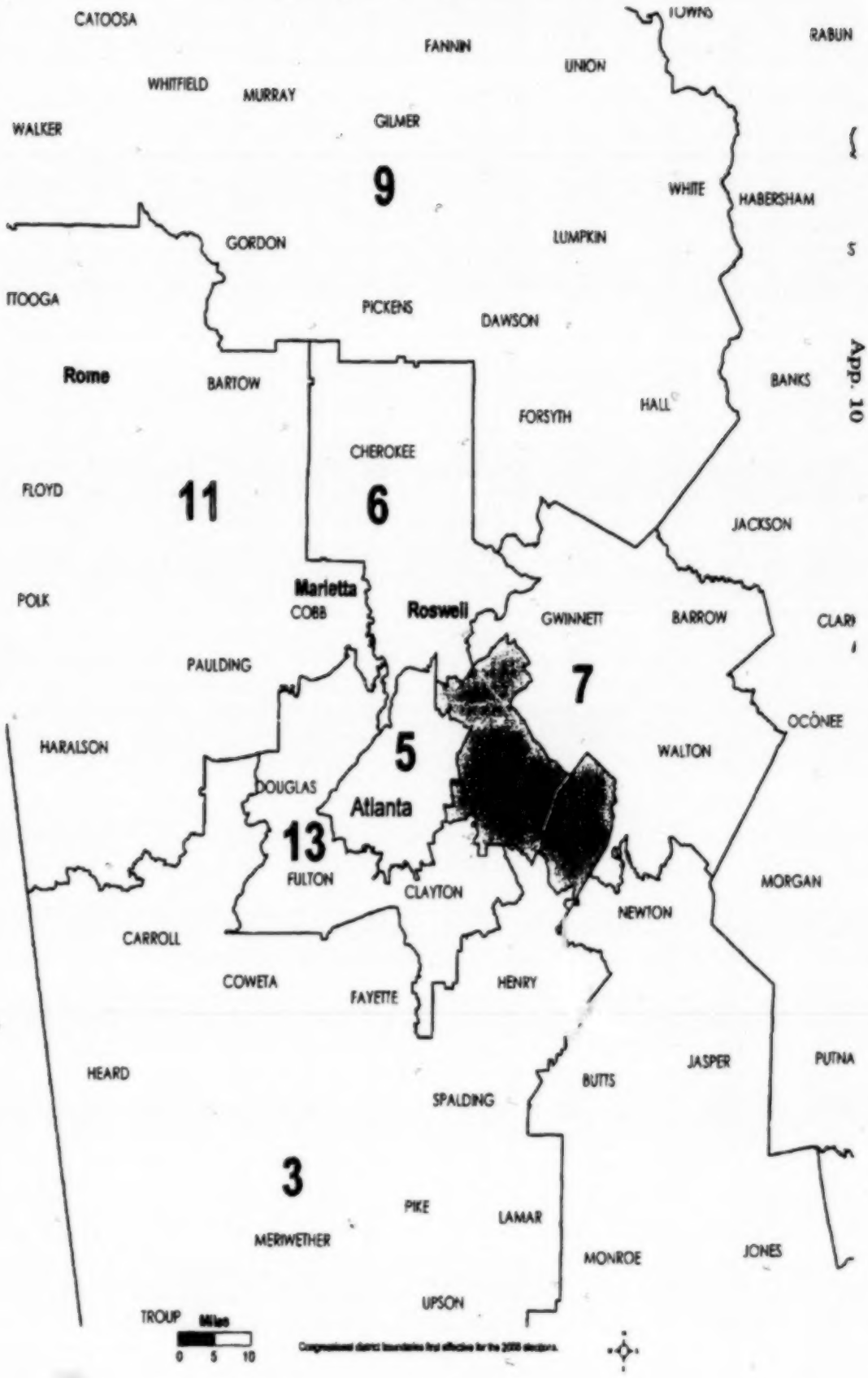


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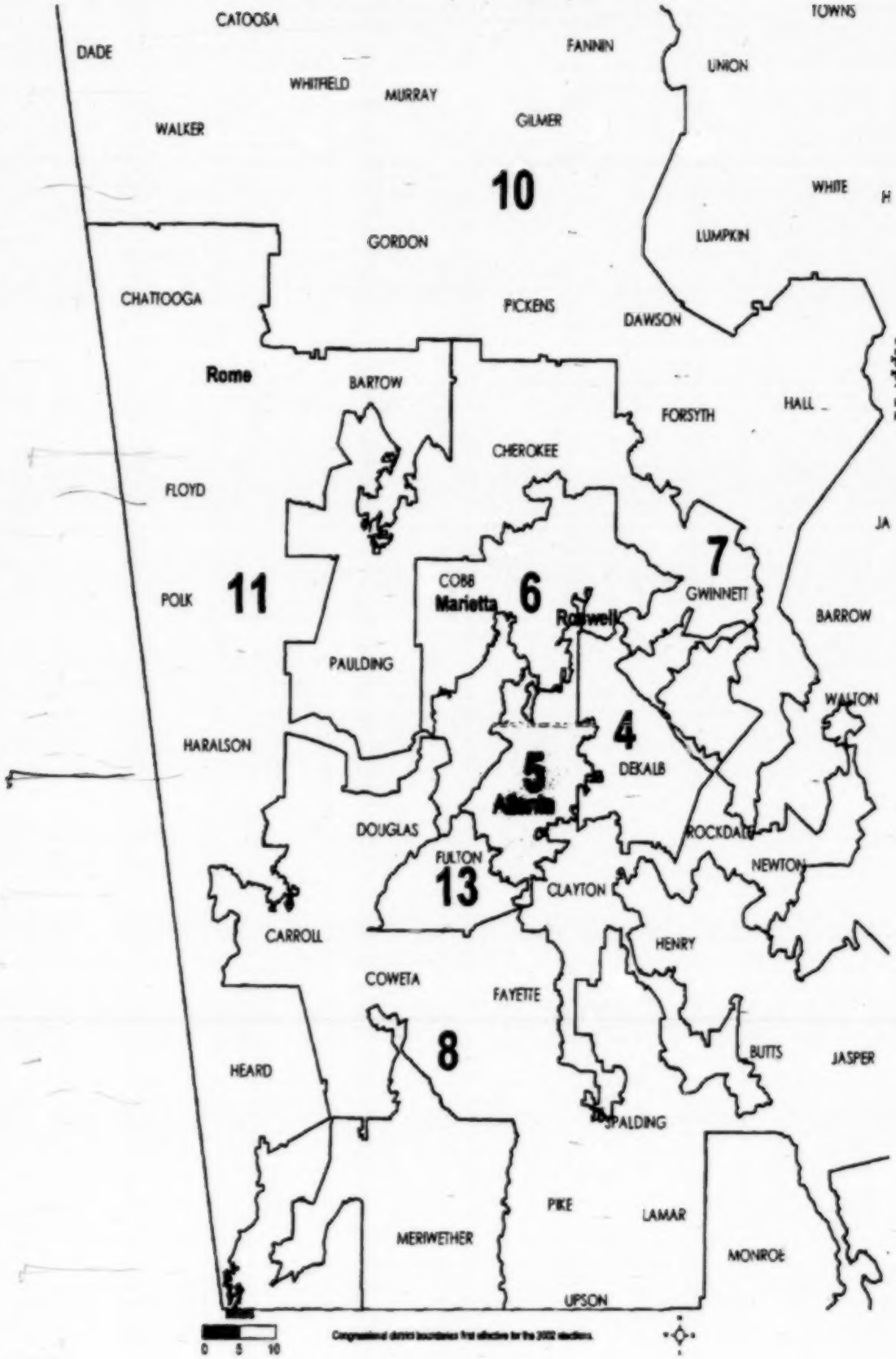


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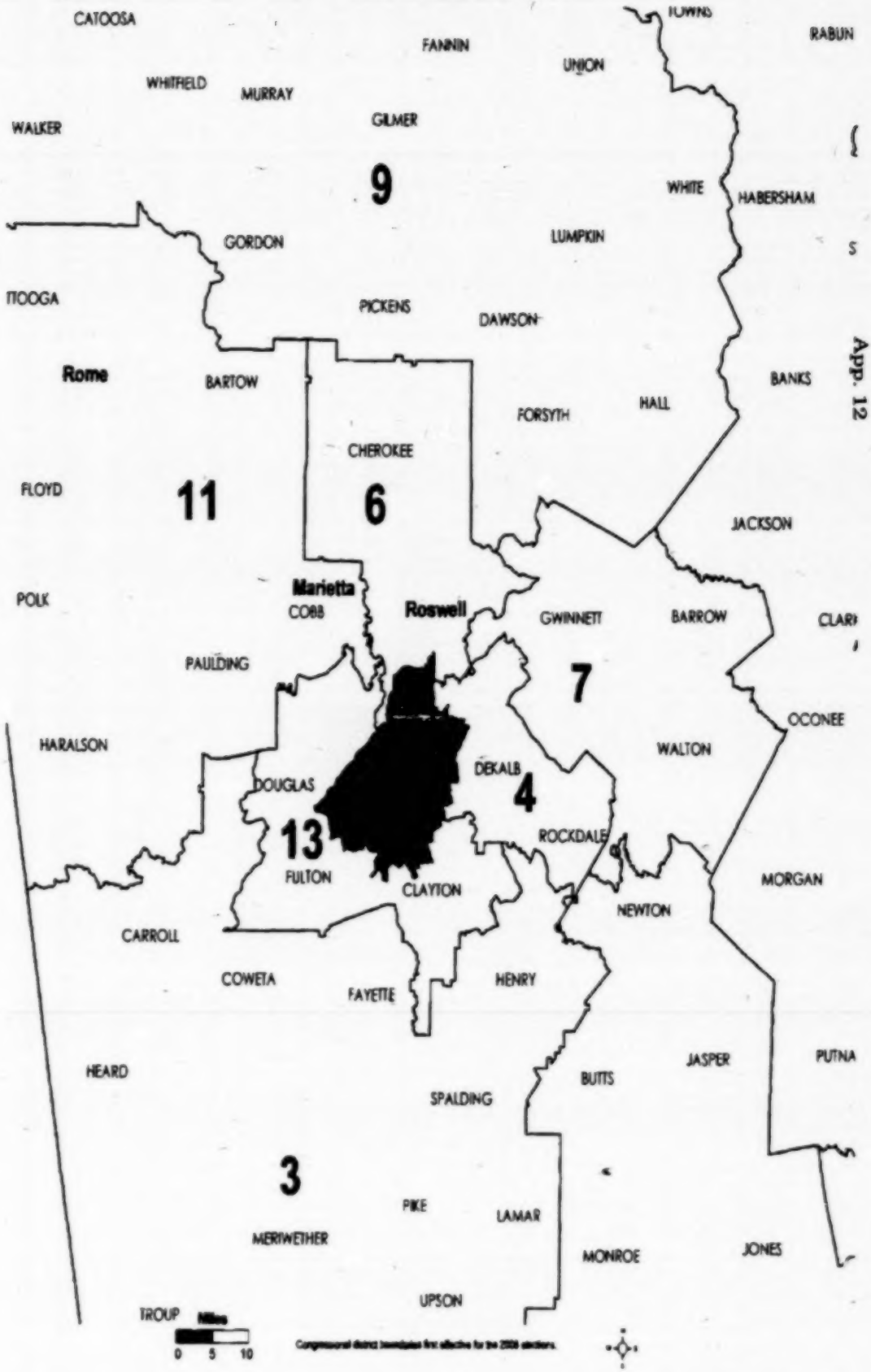


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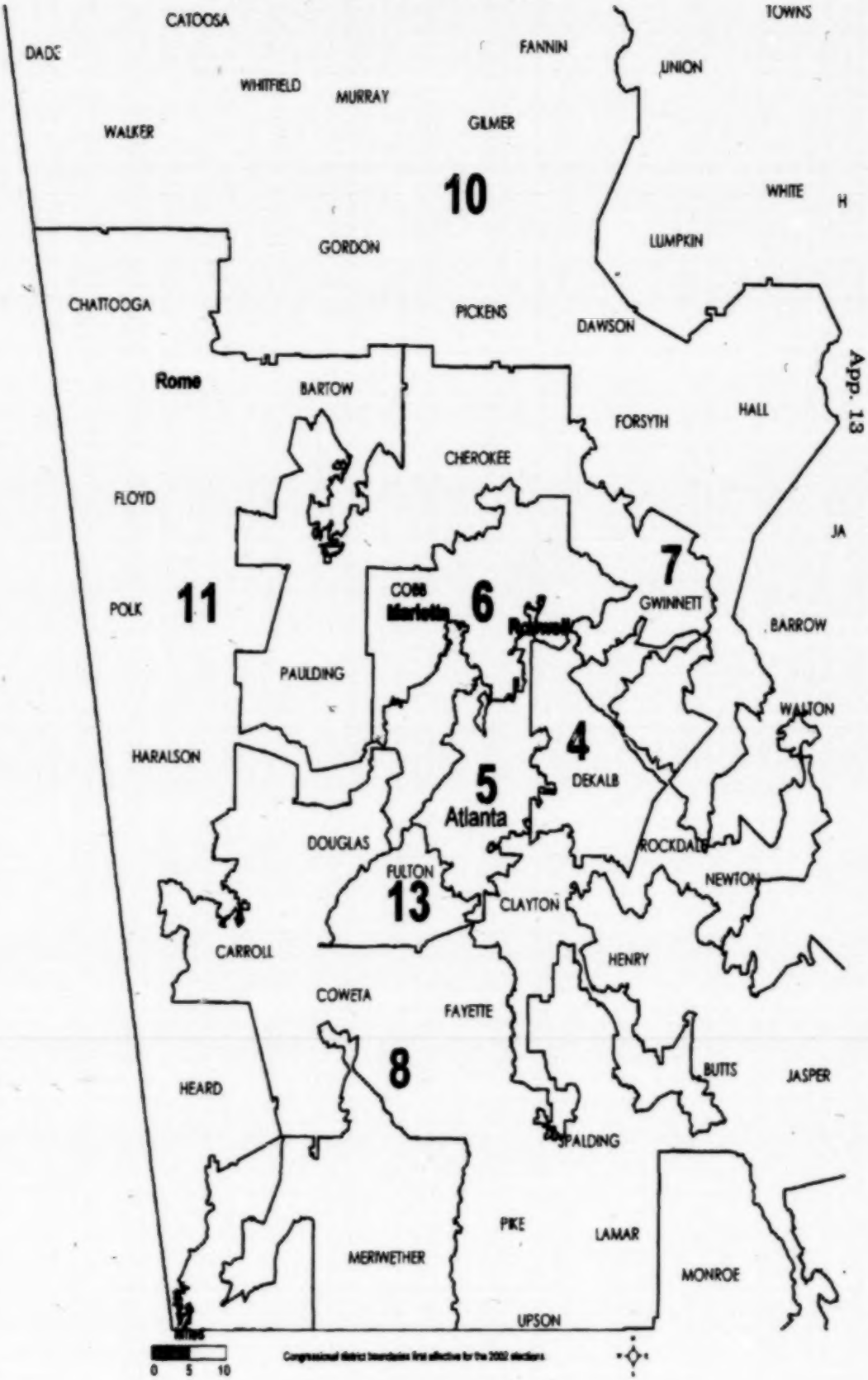


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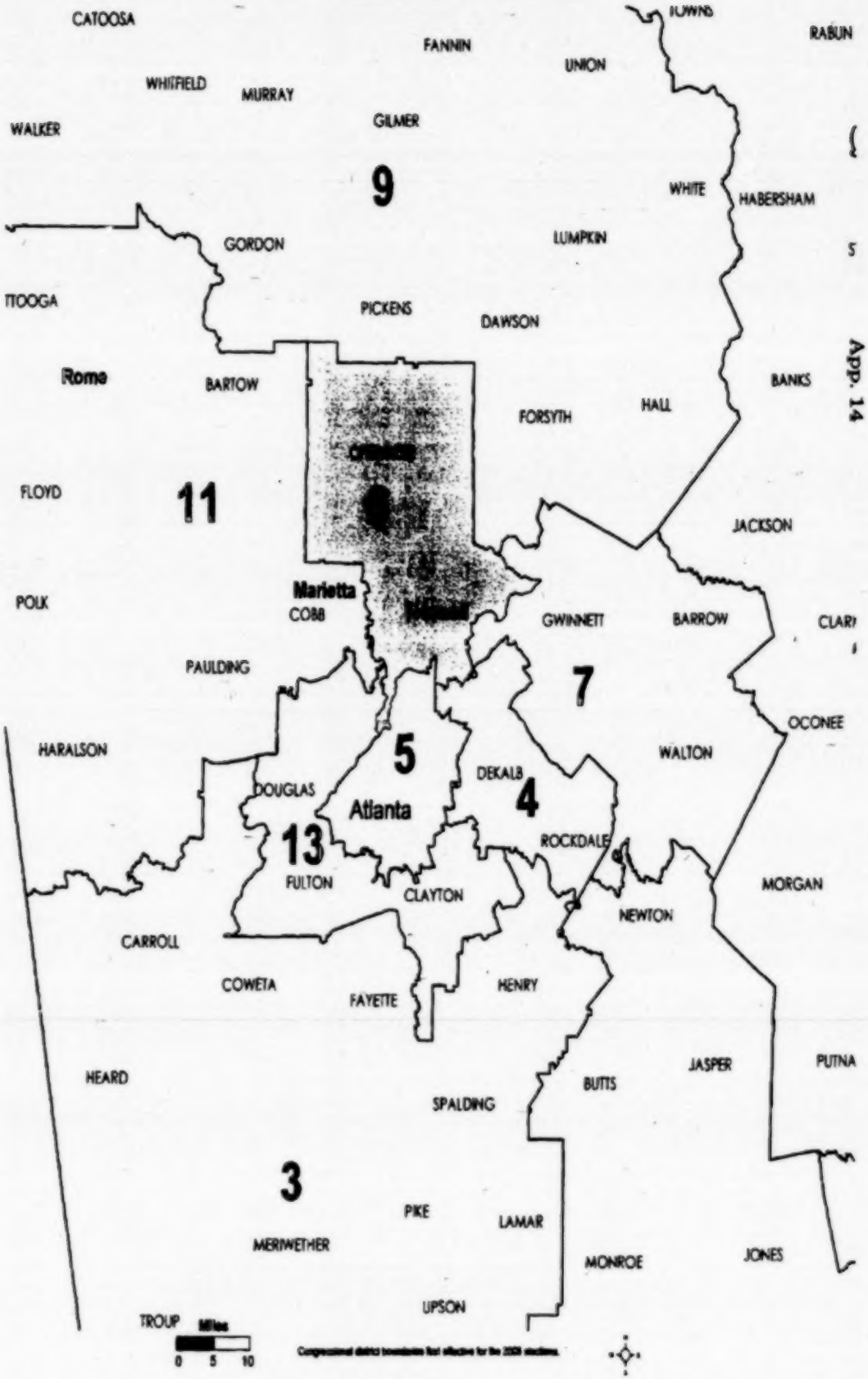


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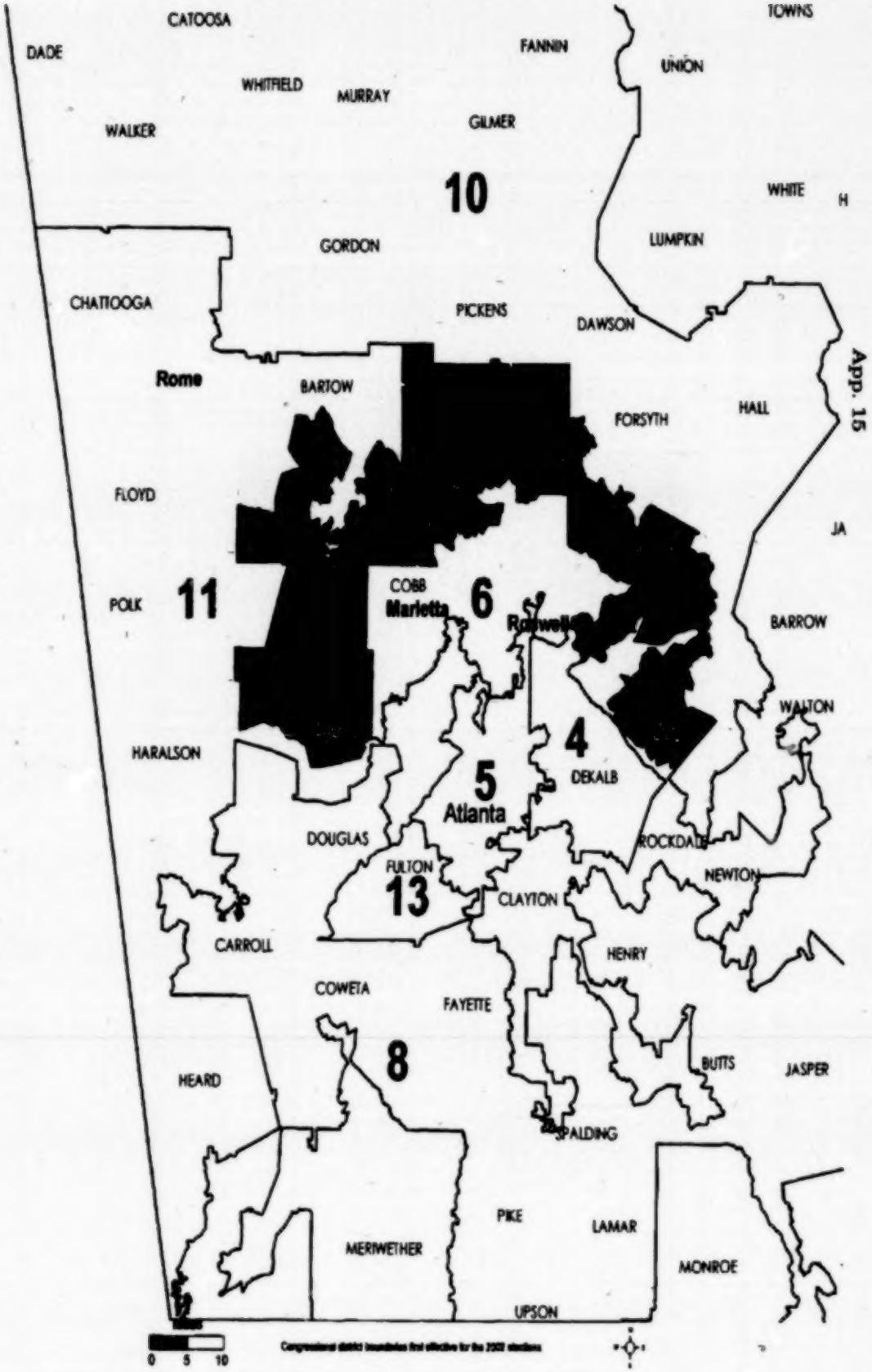

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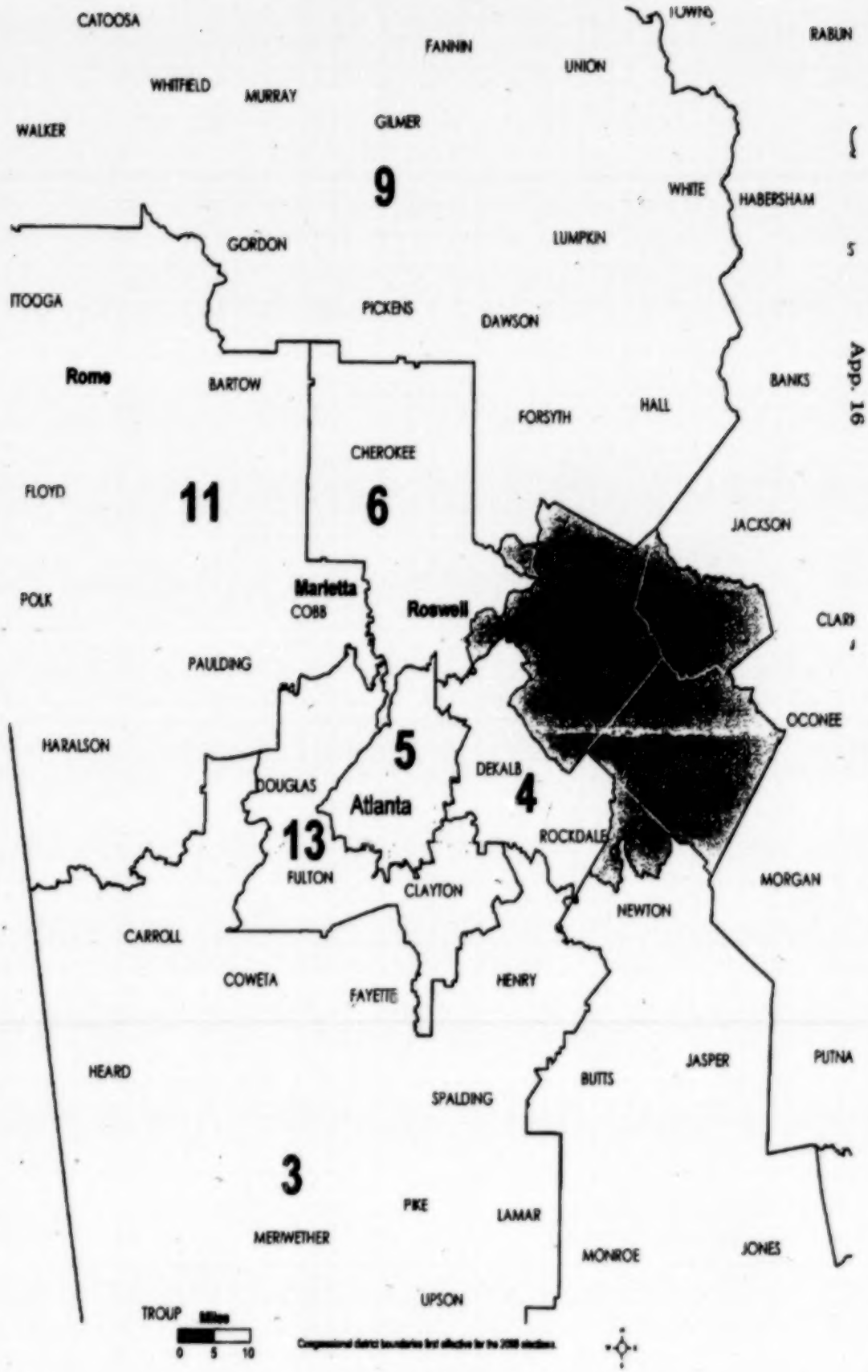


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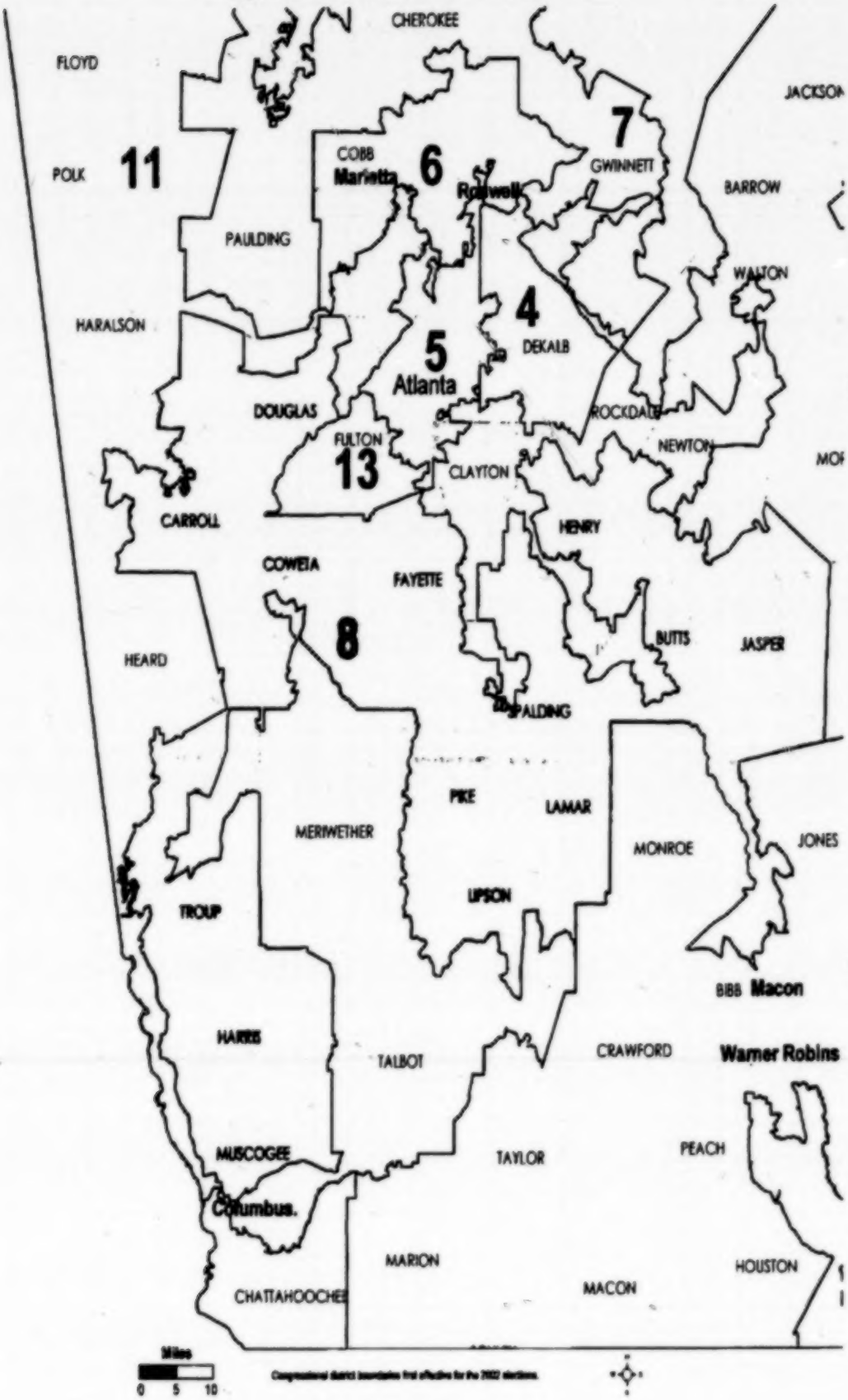

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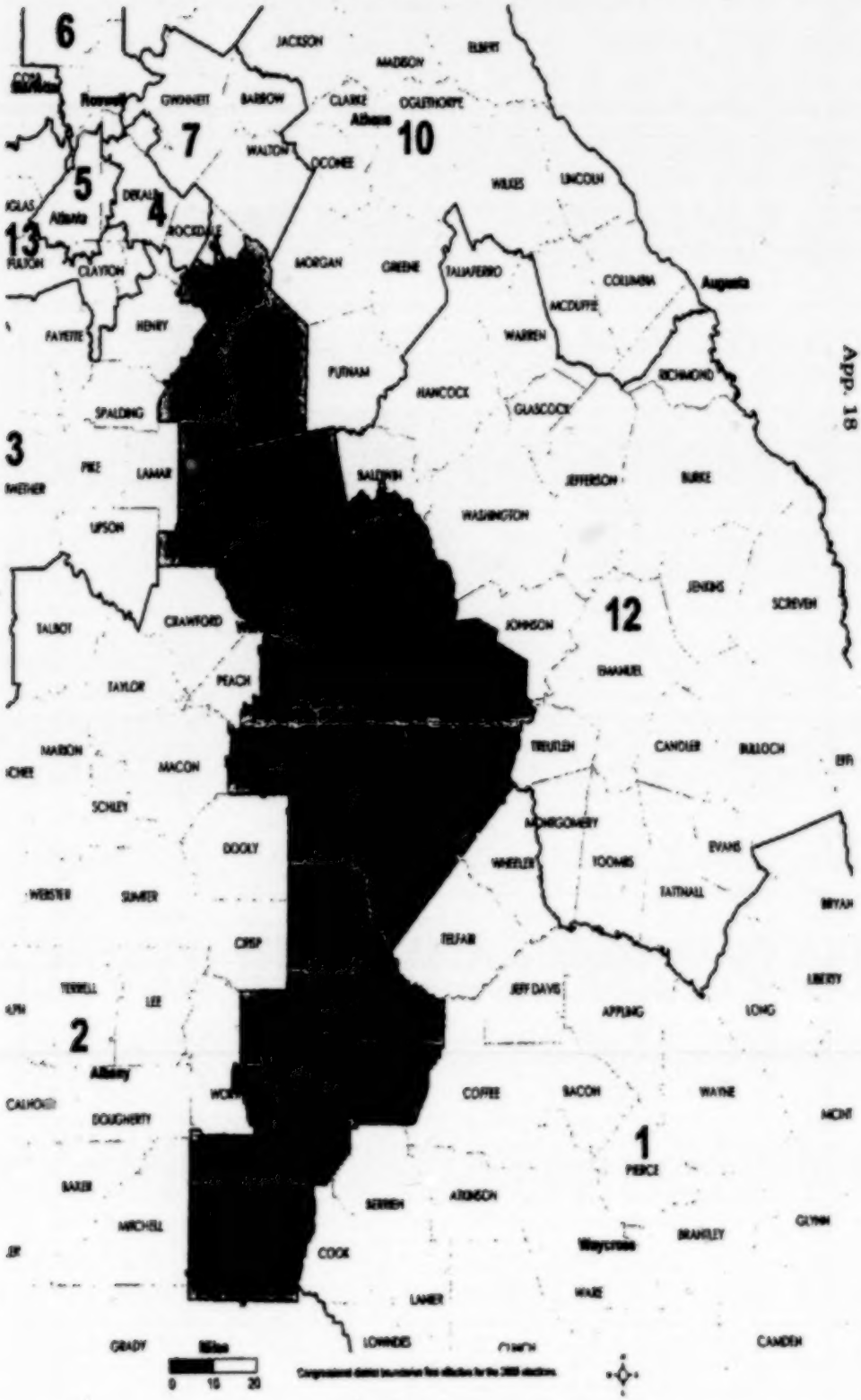


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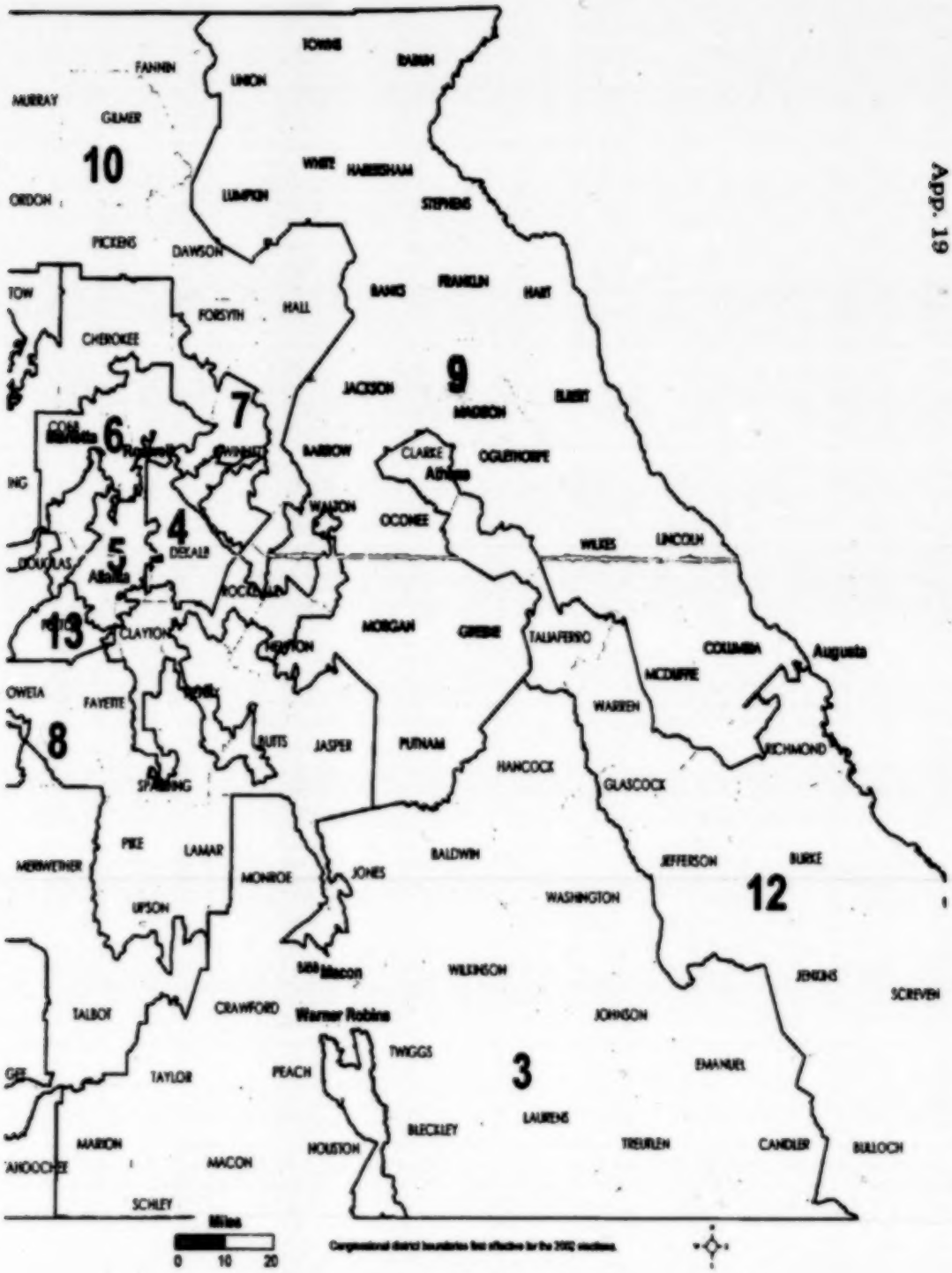


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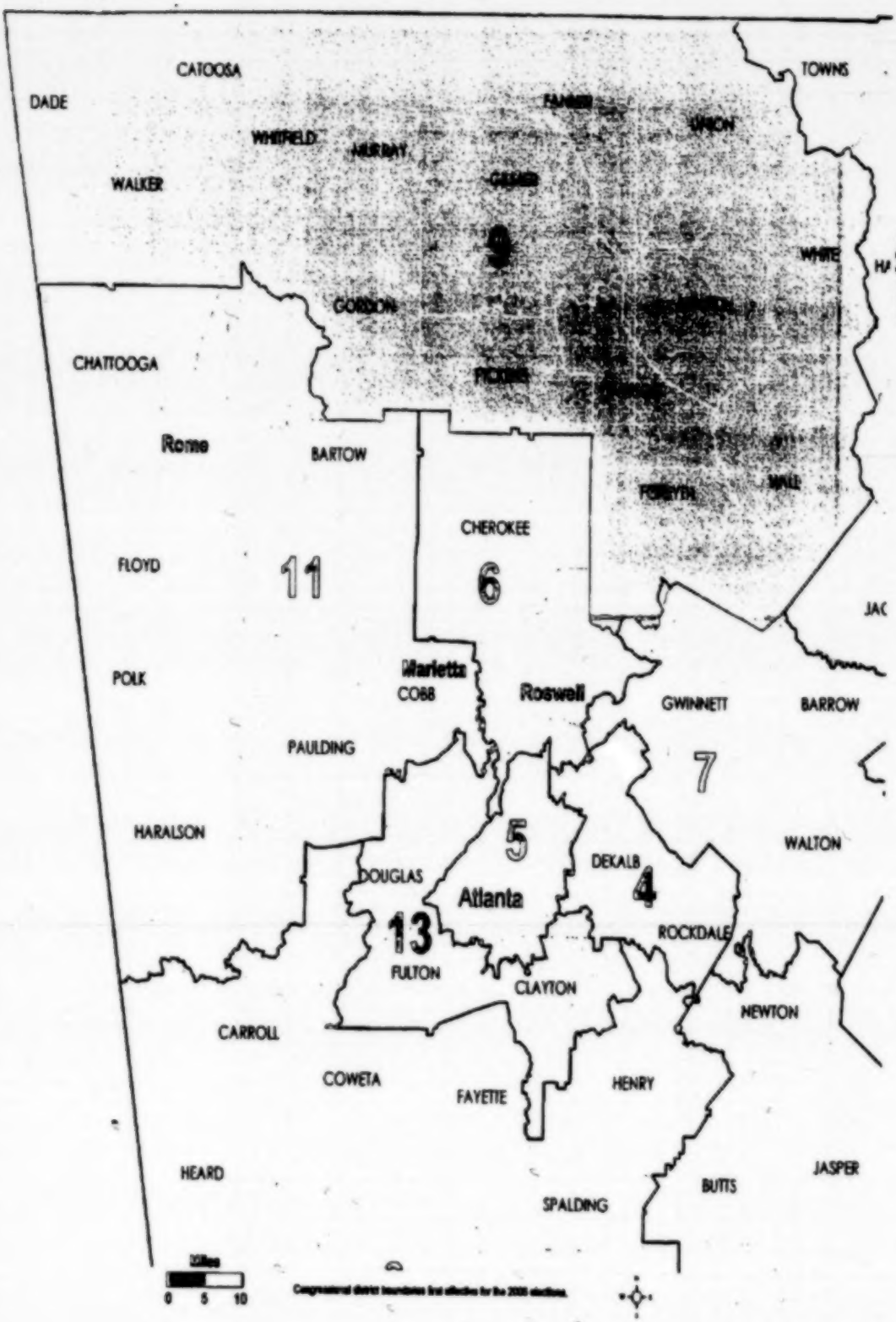

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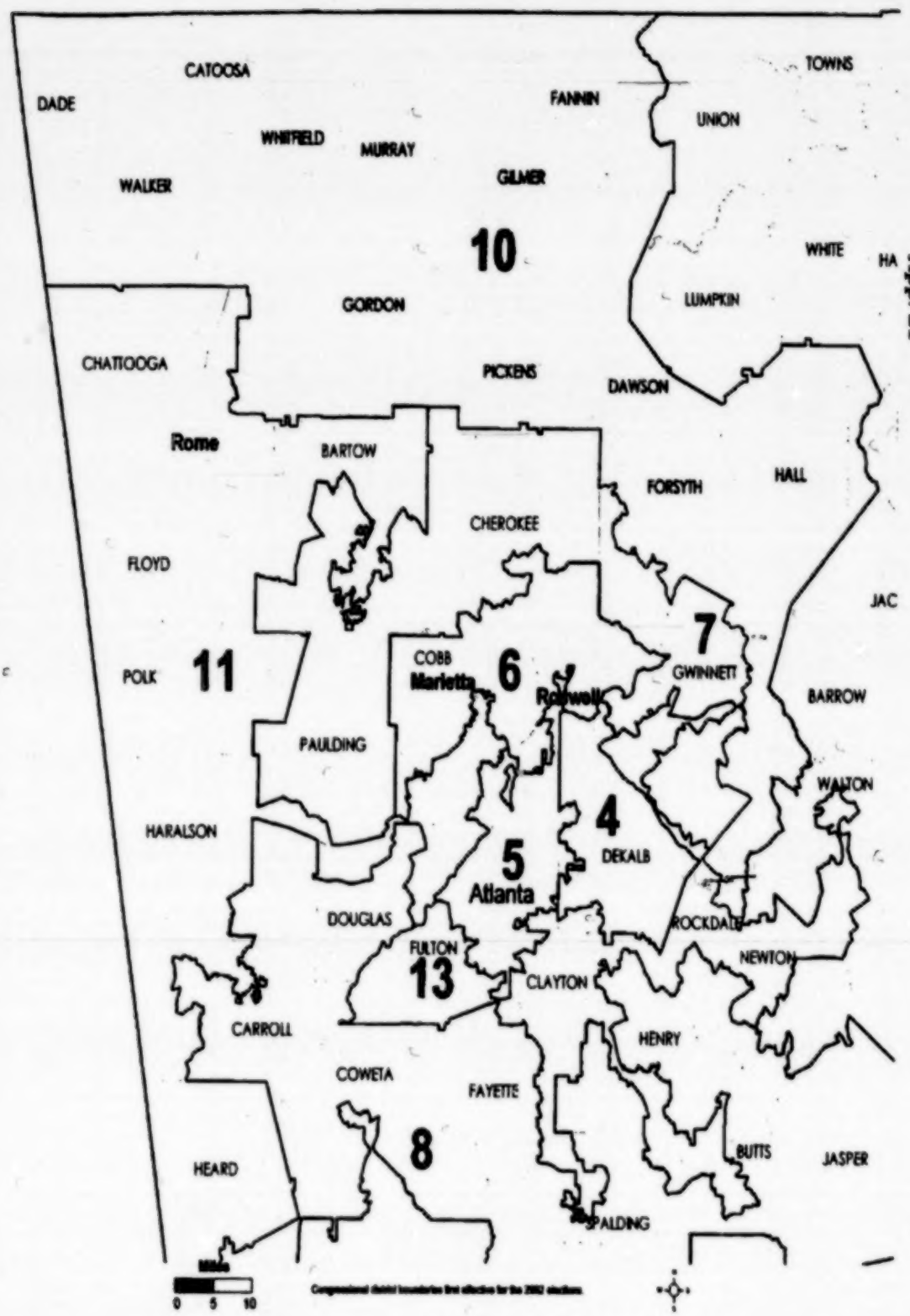


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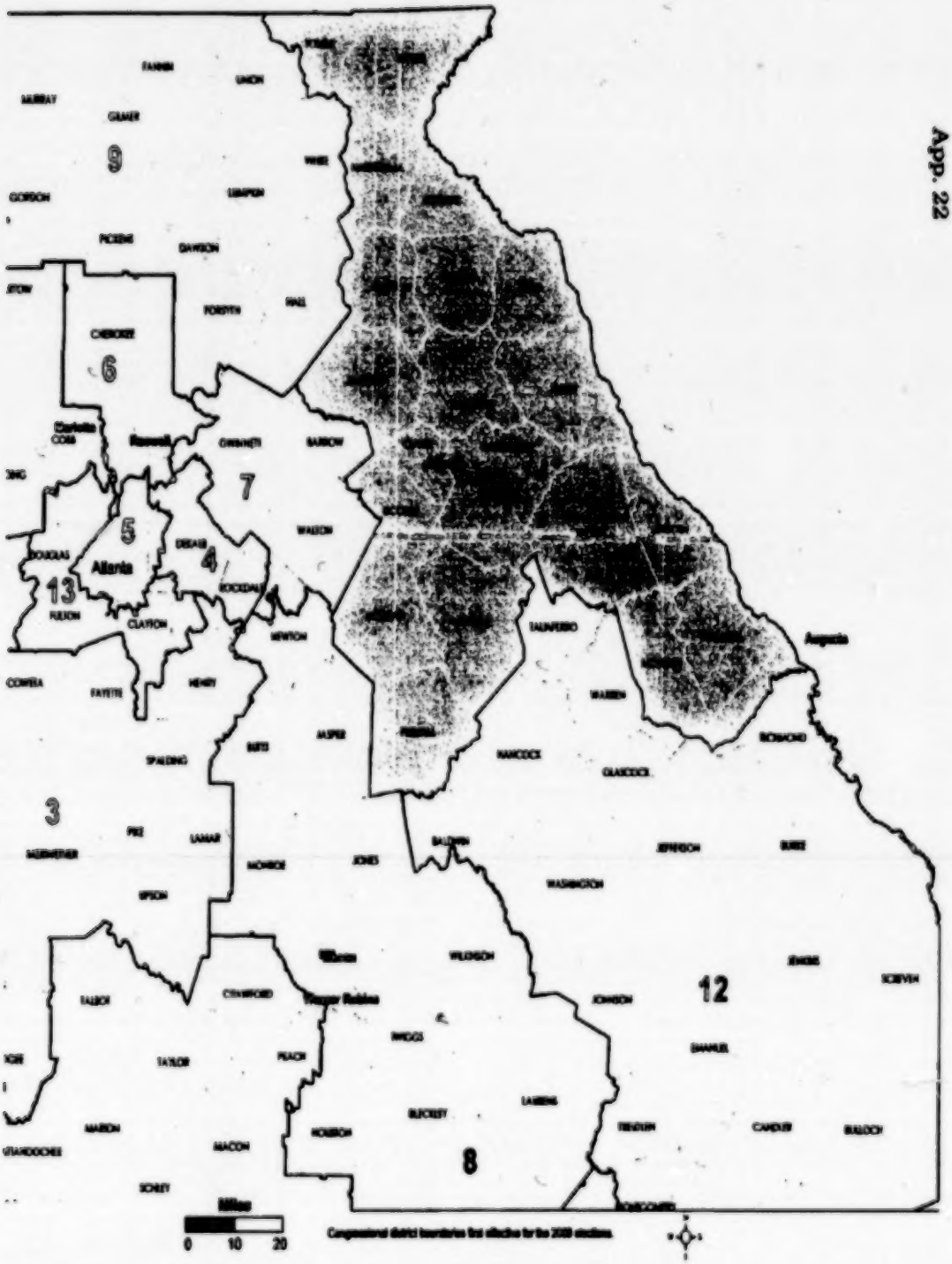

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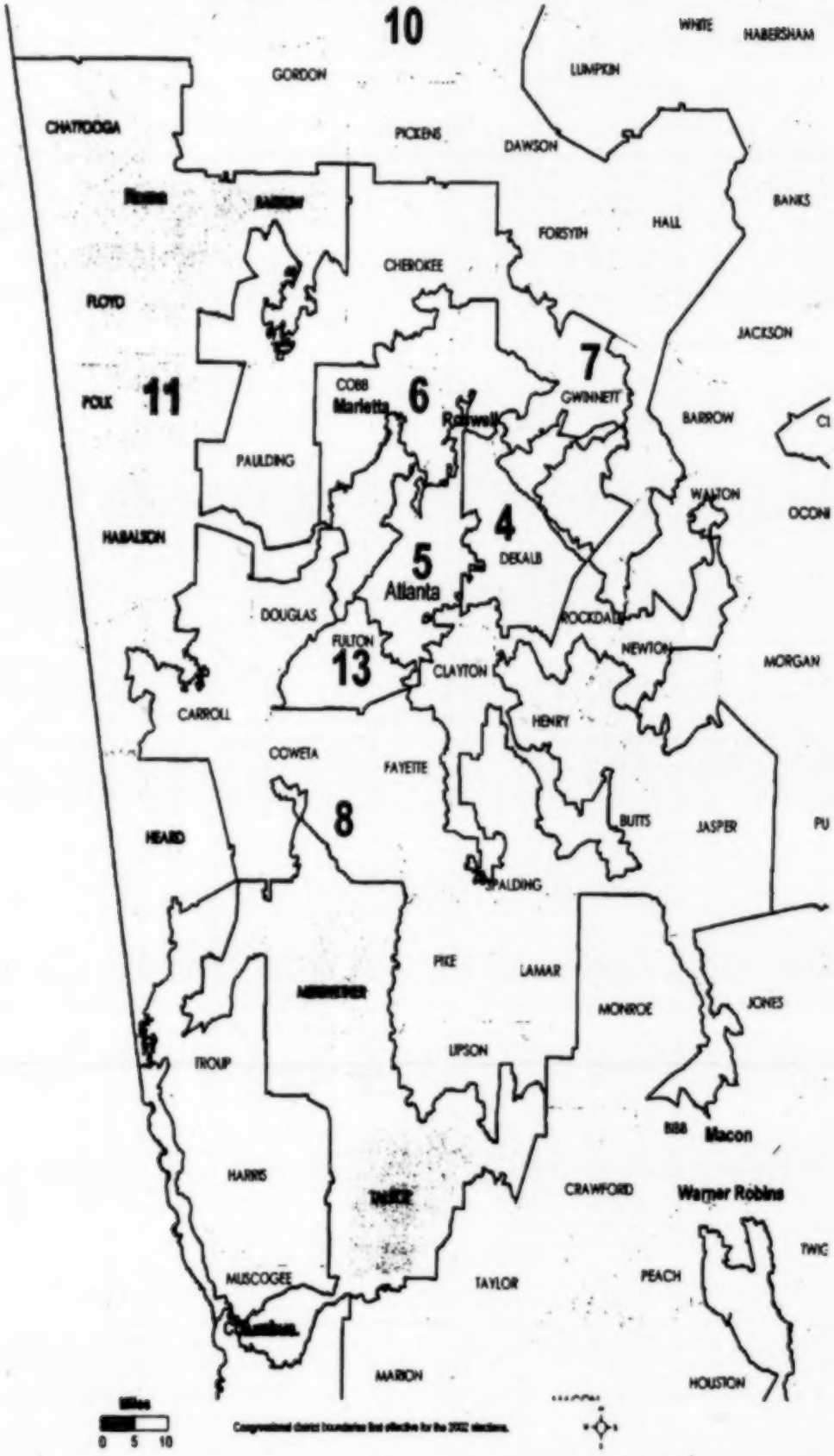

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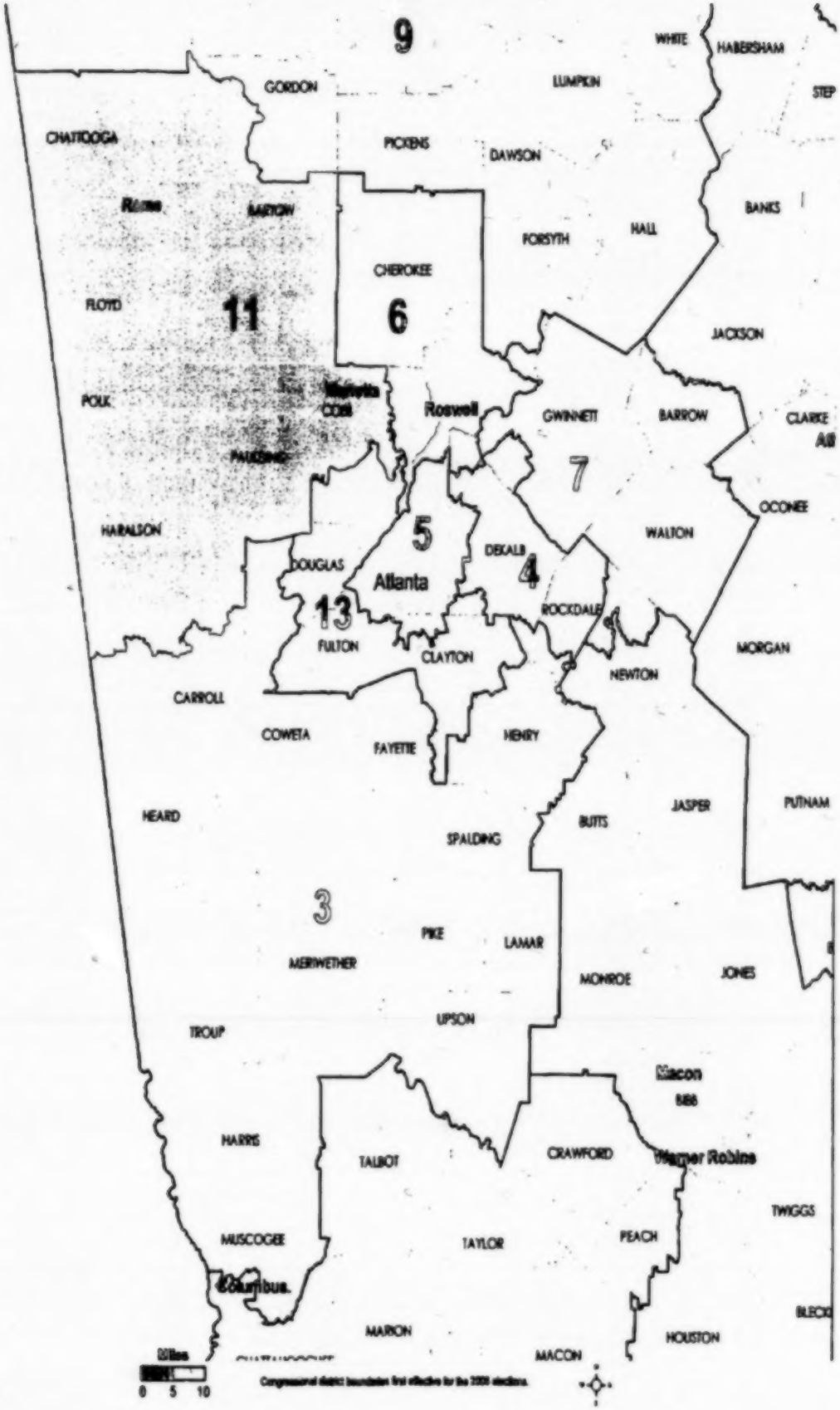

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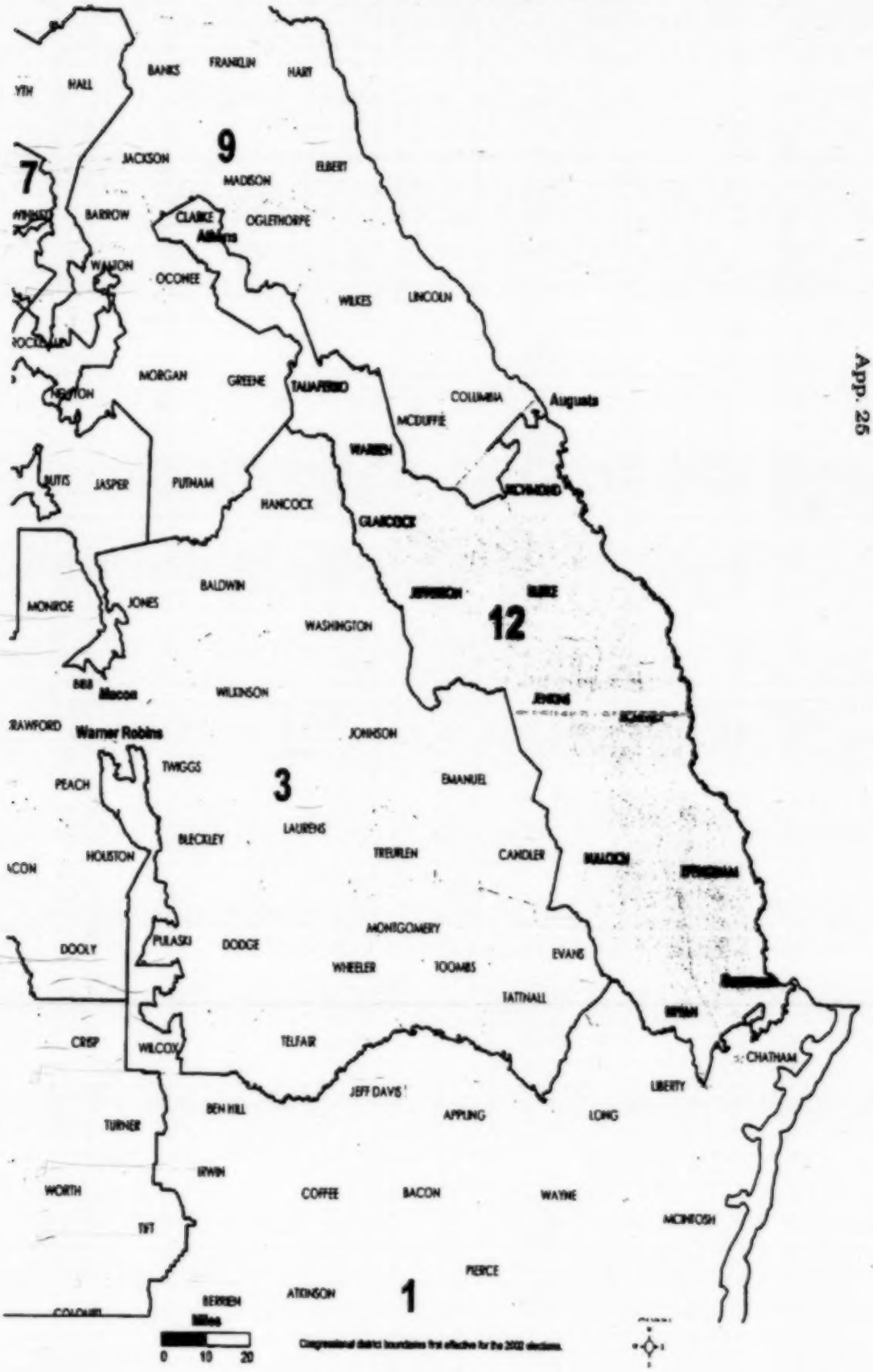


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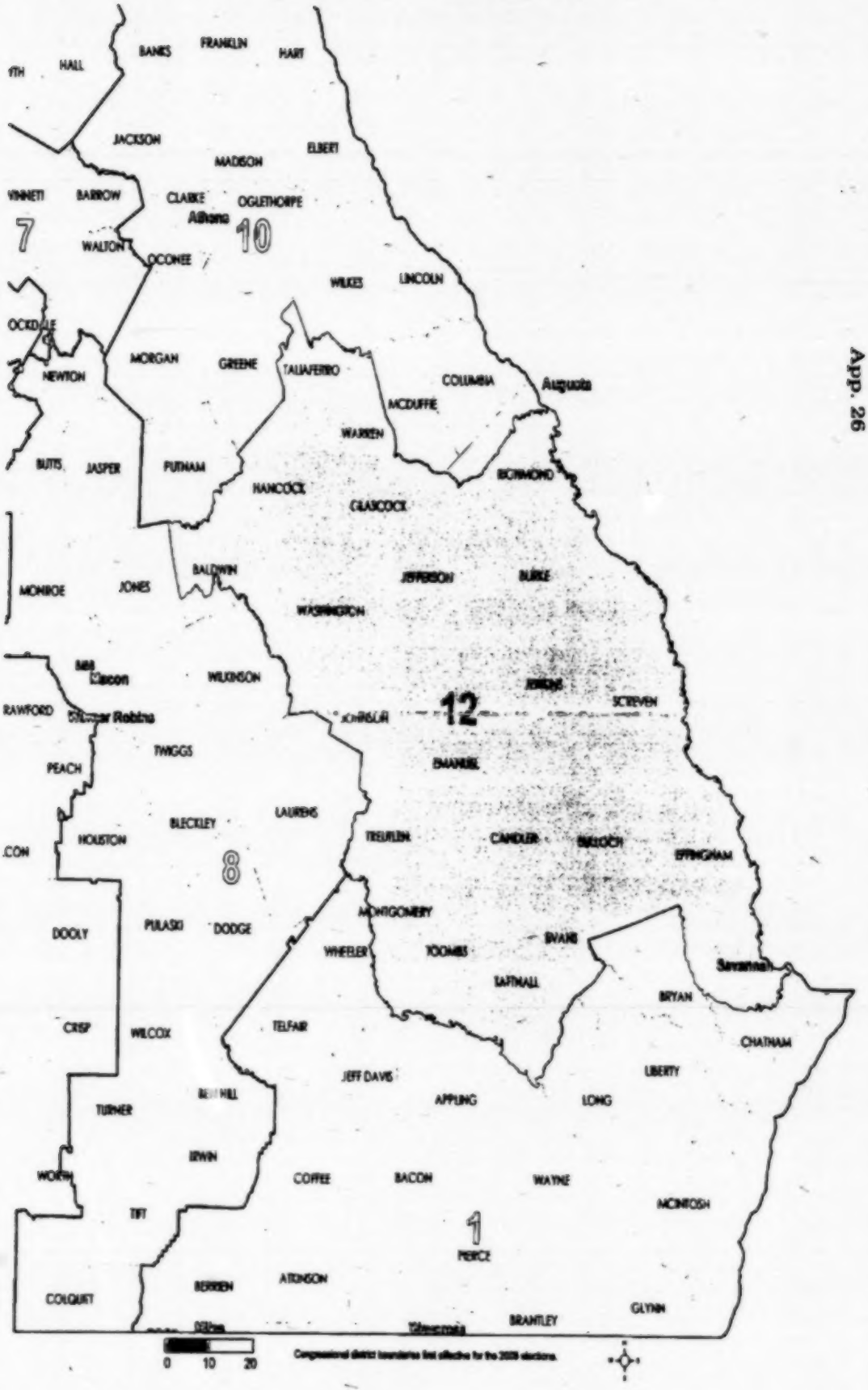

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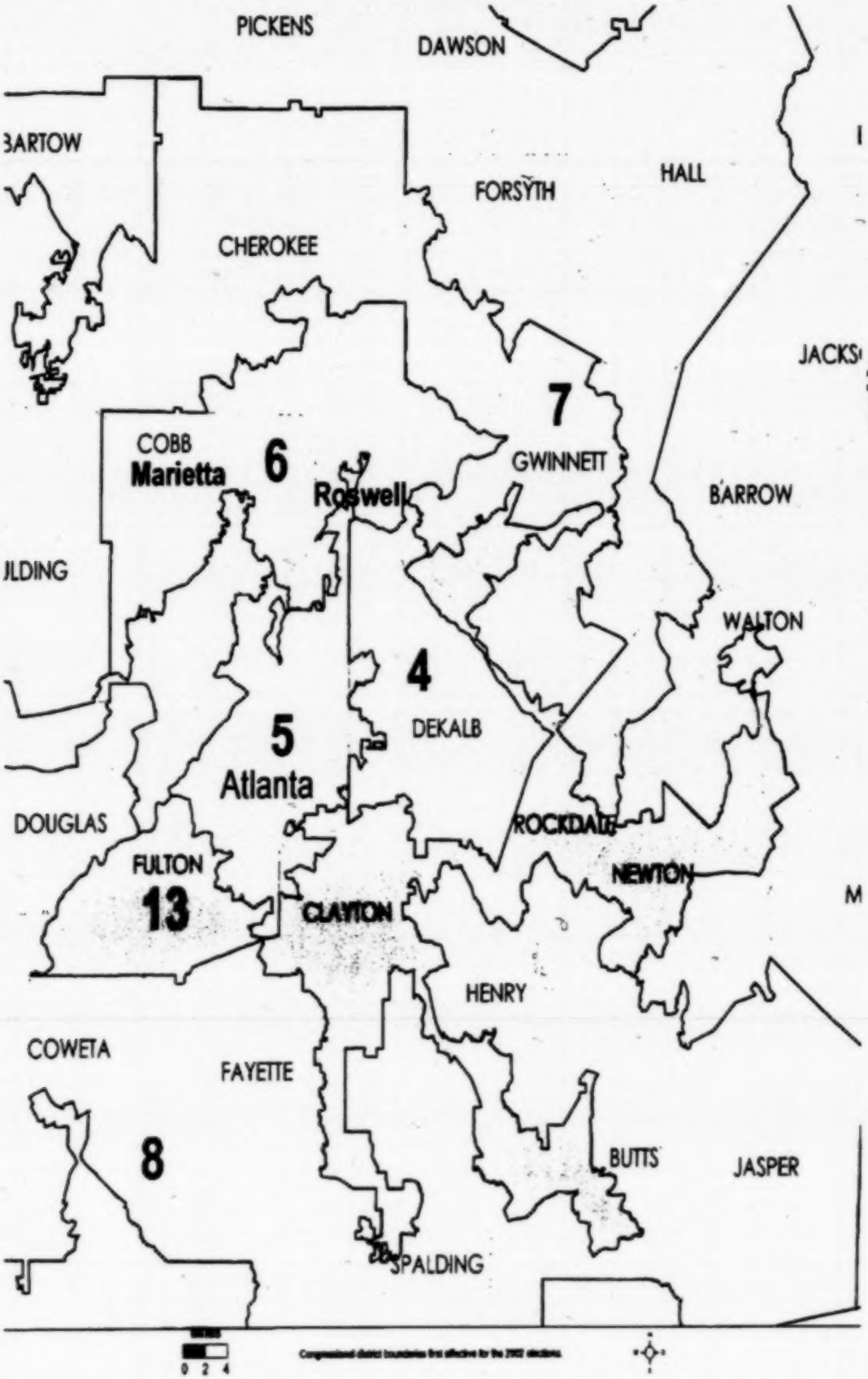

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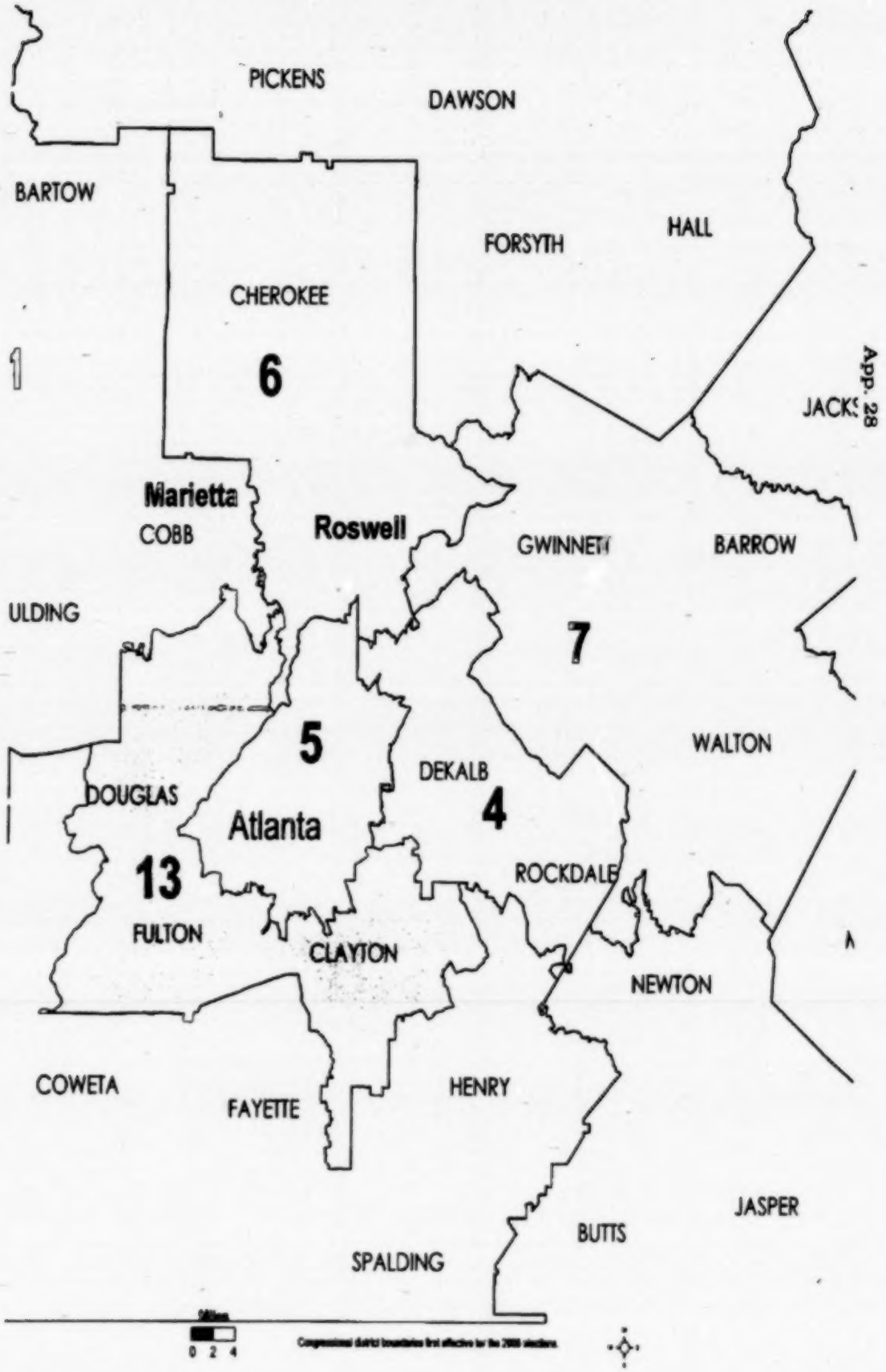

(5) (6) (8) (6)

Nos. 05-204, 05-254, 05-276 and 05-439

# In The Supreme Court of the United States

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,

*Appellants,*

v.

RICK PERRY, *et al.*,

*Appellees.*

TRAVIS COUNTY, TEXAS, *et al.*,

*Appellants,*

v.

RICK PERRY, *et al.*,

*Appellees.*

**On Appeal From The United States District Court For The Eastern District Of Texas**

## BRIEF OF *AMICUS CURIAE* UNIVERSITY PROFESSORS CONCERNED ABOUT EQUAL REPRESENTATION FOR EQUAL NUMBERS OF PEOPLE IN SUPPORT OF APPELLANTS

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EDDIE JACKSON, *et al.*,

*Appellants,*

v.

RICK PERRY, *et al.*,

*Appellees.*

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GI FORUM, *et al.*,

*Appellants,*

v.

RICK PERRY, *et al.*,

*Appellees.*

## QUESTION PRESENTED

May a legislative body, in mid-decade, voluntarily and without a compelling reason replace a valid districting plan with a new one relying on the population data from the last census?

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## INTEREST OF *AMICUS CURIAE*

This *Amicus Curiae* brief is submitted on behalf of the University Professors Concerned About Equal Representation For Equal Numbers of People. The individual *Amici* are Professors David A. Anderson (University of Texas), Julius P. Getman (University of Texas), Teresa R. LeClercq (University of Texas), Sanford V. Levinson (University of Texas), Lucas A. Powe, Jr. (University of Texas), Jordan Steiker (University of Texas), Jay L. Westbrook (University of Texas), and John Aldrich (Duke University).[1] This *Amicus* organization is submitting this brief because of concern over the impact of this case on the fundamental principle that legislative bodies must make a good faith effort to provide the citizens of a state with election districts as equal in population as practicable. The resolution of this case will be significant to the constitutional jurisprudence of this country.

The "University Professors" participated fully in this case on remand as an *Amicus*. The District Court below *sua sponte* required the State Defendants to respond to the *Amicus* brief and required the Plaintiffs to provide time at the hearing on January 21, 2005 for an oral presentation by Professor Powe on behalf of *Amicus*. Much of the lower court's written opinion deals with the written and oral arguments presented by *Amicus*. The equal representation for equal numbers of persons issue addressed by *Amicus*

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[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, *Amicus* states that none of the parties authored this brief in whole or in part and no one other than the *Amici* or counsel contributed money or services to the preparation and submission of this brief.

below and in this brief is essentially raised by two of the Appellants[3] in this consolidated case. The *Amici* believe that the information provided in this brief will assist this Court in resolving the difficult questions posed in this case.

## SUMMARY OF ARGUMENT

The congressional redistricting plan passed by the Texas legislature in 2003 was drawn voluntarily and for partisan reasons. It replaced a lawful existing plan. These facts distinguish this case from the many other redistricting cases decided by this Court in the past forty years. The new plan utilized population data that were outdated and inaccurate. This Court has never directly considered whether a partisan use of the electoral process under such circumstances is constitutional.

Appellees claimed in the court below that any legislatively enacted redistricting plan complies with the constitutional requirement for equal population among election districts so long as it contains districts that are equal in population based on the enumeration from the last federal decennial census. *Amicus* urges that the constitutional mandate requires that a legislature cannot voluntarily redistrict using population data that is known to be outdated and inaccurate unless a compelling state reason exists for the redistricting and the use of the data. Otherwise such

[3] The Travis County Appellants and the League of Latin American Citizens Appellants have raised similar "one person, one vote" or "equal population" challenges to the 2003 Texas redistricting. This *Amicus Curiae Brief* is submitted in support of these Appellants, but is not submitted in opposition to the position of any Appellant.

redistricting, to further the partisan designs of a temporary legislative majority, is a breach of a legislature's fundamental duty to make a good faith effort to provide its citizens with election districts as equal in population as practicable.

Appellees' legal position is a threat to representative government in this country. This brief discusses several of the dangers inherent in Appellees' position. One threat, however, stands out as a result of oral argument in the court below. In response to a question from that court, Appellees' counsel correctly acknowledged that, if the Appellees' legal position is correct, a state legislative body can voluntarily redraw state legislative districts at the end of a decade (e.g., 2009) using data from the prior federal decennial census. Such a possibility means that a temporary political majority in a highly charged partisan environment can voluntarily redraw state legislative districts immediately prior to elections at the end of a decade (e.g., 2010) notwithstanding population shifts in the state over the decade. Through this maneuver, a temporary partisan or interest majority can redistrict to preserve or enhance its political advantages and thereby unfairly control the redrawing of state and congressional districts after the new census.

Many other state and local government officials have already publicly expressed an interest in the possibility of following the Texas example and redrawing existing election districts during this decade to benefit one partisan or special interest over another. Others will surely do so if this Court upholds the Texas congressional redistricting plan. Such a prospect of a "rolling redistricting" on the basis of old, inaccurate population data is anathema to the constitutional principle of one person, one vote and a

threat to representative government. It would constitute further unfortunate confirmation of representatives picking their voters rather than vice versa.

Adoption by this Court of the position urged by *Amicus* in this brief can end this threat through the common sense, easily administered application of existing constitutional principles.

## ARGUMENT

### I. Voluntary Redistricting Using Inaccurate Population Data is a Threat to Fundamental Constitutional Rights and Representative Government.

Few, if any, officials have suggested that voluntary redistricting mid-decade is a good policy. Virtually any redistricting is likely to be divisive, distracting, confusing to voters, and costly of legislative time and energy. As shown by the extraordinary events in Texas in 2003, a voluntary mid-decade redistricting undertaken to maintain or enhance a temporary majority's political strength is likely to be even more disruptive. Voluntary redistricting mid-decade by a state or local legislative body using inaccurate population data is a way of thwarting political changes that would normally accompany population changes and shifting voter preferences. As Justice Breyer recognized in his dissent in *Vieth v. Jubelirer*,[3] a political party might redistrict periodically during a decade to

[3] 541 U.S. 267 (2004).

preserve its political advantages notwithstanding population shifts in the state. A temporary majority in a state legislative body may redistrict state legislative districts at the end of a decade to permit itself to maintain or enhance its dominance for the critical time of redistricting after the new census. The court below asked Appellees' counsel whether Appellees' legal position in this case would permit such a redistricting for partisan advantage at the end of a decade, and Appellees' counsel correctly answered that it would.[4]

The 2003 redistricting in Texas is a perfect example of how Justice Breyer's concerns were fulfilled. The final redistricting plan passed in Texas was unlike either of the plans passed earlier in the legislative session by the Texas Senate or the Texas House. The conference committee that was charged with resolving differences between the two plans never met. Instead, the final plan was accomplished literally behind closed doors by a handful of like-minded partisan activists using computers to manipulate data from a variety of political data bases designed to predict how each election precinct statewide would perform in future congressional elections. Plans were endlessly tweaked on computer monitors to achieve the best possible partisan result. All of this secret activity occurred under scrutiny and pressure from external partisan interests. The 2003 memoranda[5] from Mr. Jim Ellis to Congressman Tom DeLay provide a valuable insight into what was actually happening throughout 2003 and at this final stage. In his memorandum of October 5, 2003, Ellis notes

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[4] Transcript at 138-139 (January 21, 2005).

[5] Jackson Pls. Exhibit No. 136.

that he and Congressman DeLay had already achieved the goals of "helping Bonilla (District 23) and eliminating the Frost district (District 24)" through changes achieved at the conference committee. However, Ellis urged that further "major adjustments must be made to ensure that the map reflects the priorities of the congressional delegation and not the legislature." Ellis lamented that the map under consideration at the time was still flawed with "largely insignificant state legislative agendas." Ellis concluded his October 5th memorandum to DeLay with the insistence that "[w]e need our map, which has been researched and vetted for months. The pre-clearance and political risks are the delegation's and we are willing to assume those risks, but only with our map."[6]

Congressman DeLay journeyed again to Austin. For the next few days he met with the state officials. Ellis got his wish. The final redistricting map was unveiled on October 9th, only three days before it was finally passed by an exhausted Texas Legislature. This final plan embodied an extreme partisan aggressiveness. Unlike the maps adopted earlier by the Texas House and Texas Senate, this final plan bolstered Republican Congressman Bonilla's District 23 with Anglo Republican counties, dismantled District 24 (Congressman Frost), and targeted every Anglo Democratic incumbent for defeat by dismantling their existing districts and leaving their residence in a heavily Republican district. The plan was a partisan masterpiece that not only resulted in the immediate (2004) gain by Republicans of six seats in Congress from Texas,[7] but will

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[6] Id.

[7] The plan resulted in a loss of six Democratic seats in Congress. Four Democratic incumbents were defeated for reelection in the 2004

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control the outcome in Texas congressional elections for the foreseeable future notwithstanding expected population shifts that otherwise should favor Democrats.

Voluntary redistricting may use unreliable federal decennial census data to disguise redistricting plans drawn to unfairly discriminate in a real sense against certain categories of voters. By using more current political and demographic data, such as voting trends (in voter registration, voter turnout, and partisan tendency), to determine district boundaries, a temporary legislative majority may pack opposing voters in as few districts as possible or counter an anticipated future growth in opposing voters in an election district by removing the voters from the endangered district. This discrimination may be disguised by the use of old, currently inaccurate census data to justify the new district configurations.

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general election (Congressmen Max Sandlin, Nick Lampson, Martin Frost and Charles Stenholm). One Democratic congressman (Jim Turner) declined to seek reelection in his redrawn district that contained only 4% of the residents of his previous district. One Democratic congressman (Ralph Hall) switched parties after the redistricting and won reelection in 2004 in his redrawn district as a Republican. Democratic Congressman Chris Bell was drawn out of his district and placed in a heavily Republican district. He sought reelection in a nearby congressional district, but lost in the Democratic Primary to African-American candidate Al Green. Only three of the ten Anglo Democratic incumbents won reelection as Democrats in 2004. Two of these won reelection only by running in nearby districts that are overwhelmingly Hispanic. The overall result of the redistricting was the defeat, retirement or switch of seven of the ten targeted Anglo incumbent congressmen, the gain by Republicans of six seats in Congress, and the marginalization of the Democratic Party in Texas by the packing of Democratic voters into ten districts, each with a minority population (according to the 2000 census) of over 70%. Only one Democrat, Congressman Chet Edwards, won election in a district with less than a 71% minority population.